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No. 86-_____

Supreme Court, U.S.
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In the Supreme Court of the United States
October Term, 1986

MORRIS THIGPEN, ET AL.,
PETITIONERS

VERSUS

KENNETH W. WHEAT
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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188 pp

QUESTION PRESENTED

1. Certiorari should be granted where the Court of Appeal erred in holding that the Mississippi Supreme Court did not regularly and strictly impose its procedural bar and therefore Respondent's claim of improper closing argument was not procedurally barred from its consideration by Wainwright v. Sykes and Engle v. Isaac.

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NO. 86-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MORRIS THIGPEN, COMMISSIONER, ET AL.,

Petitioners,

VS.

KENNETH W. WHEAT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, State of Mississippi, respectfully prays that the Petition for Writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted in this case.

OPINIONS BELOW

The opinion of the Court of Appeals that forms the basis of this petition is reported as Wheat v. Thigpen, 793 F.2d 621 (5th Cir.

1986). Petition for rehearing and suggestion for rehearing en banc were denied without opinion. Wheat v. Thigpen, 797 F.2d 977 (5th Cir. 1986). A copy of the opinion is attached hereto in Petitioner's Appendix at A-1 - A-50.

Other opinions below pertinent to the determination of this case are:

State Court: Respondent's original conviction and sentence of death we reaffirmed the Mississippi Supreme Court by written opinion reported as Wheat v.State, 420 So.2d 229 (Miss. 1982). No petition for rehearing was filed. A-170. Wheat's application for leave to file a petition for writ of error coram nobis was denied by written opinion. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). A-157

United States Supreme Court: This court's denial of respondent's petition for writ of certiorari subsequent to his Direct Appeal is reported as Wheat v. Mississippi, ___U.S. ___, 75 L.Ed.2d 936 (1983).

United States District Court: The District Court opinion denying relief as to the guilt phase and granted relief as to the sentence phase is not reported, but may be found in the appendix at A-51 - A-156.

JURISDICTION

Petitioner invokes the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States VIII and XIV. Petitioner also relies on Section 28 U.S.C. §2254 (a), viz.,

> ". . . a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to a judgment of the State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

STATEMENT OF THE CASE

A. Substantive Facts

The facts of this cases are adequately set forth in the opinion of the Mississippi Supreme Court reported as Wheat v. State, 420 So.2d 229 (Miss. 1986).

B. Procedural History

Respondent, Kenneth William Wheat, was indicted for the capital murder of Joseph M. Mayer by the Grand Jury of the Circuit Court of Harrison County,Mississippi, First Judicial District, during the September Term 1979. Respondent was tried during the January 1980 Term of said Court. His bifuracted trial was conducted under the procedures set forth in Sections 99-19-101 to 197, Miss. Code Ann. Supp. 1977), and Jackson v. State, 337 So.2d1242 (Miss. 1976). The jury found respondent guilty of capital murder and then

after hearing additional testimony and arguments of counsel, returned a sentence of death in the proper form.[1]

On automatic review to the Mississippi Supreme Court, the conviction and sentence of death was affirmed by a unanimous court on October 6, 1982. Wheat v. State, 420 So.2d 229 (Miss. 1982). No petition for rehearing was filed as respondent had dismissed his retained counsel and refused to employ others until shortly before a December 8, 1982 execution date.

On November 26, 1982 this Court stayed respondent's execution date pending disposition of his petition for writ of certiorari. In due course the petition was denied on March 28, 1983. Wheat v. Mississippi, ___ U.S. ___, 75 L.Ed.2d 936 (1983).

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[1] Respondent had been tried during the December, 1979, Term of the same court for the murder of Mrs. Mayer. He was convicted of capital murder and sentenced to life for that crime.

Upon denial of certiorari, respondent filed an application for leave to file a petition for writ of error coram nobis with the Mississippi Supreme Court. See Miss. Code Ann. §99-35-145 (repealed April 17, 1984, Ch. 378, Miss. Gen. Laws 1984). On May 11, 1983, in a written opinion, the Mississippi Supreme Court denied the application. Citing Wainwright v. Sykes, 433 U.s. 72, 97 S.Ct. 2497,53 L.Ed.2d 2d 594 (1977), Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71L.Ed.2d 783 (1982), and Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), the Mississippi court noted that the factual issues which had been litigated on direct appeal were res judicata and those which had not been raised were forfeited. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983).

Respondent then filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. After two evidentiary hearings the District Court, on August 20, 1985, issued

its memorandum opinion denying relief as to the guilt phase of the original proceeding and vacating the sentence of death. The District Court held that the decision of the Mississippi Supreme Court in respondent's post-conviction proceeding holding that claims that could have been but were not raised on direct appeal where forfeited was a radical departure from prior practice and therefore violated the holdings of Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (9164) and Hathorn v. Lovorn, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). The District Court held that because this was a radical departure from prior precedent it did not have to respect the procedural bar imposed by the Mississippi Supreme Court on the basis of respondent's failure to raise the claim on direct appeal even though it could have been raised and should have been raised at that time. This finding allowed the District Court reach the merits of a claim of improper argument by the

prosecutor during the closing argument of the sentence phase. Reaching the merits the District Court found it violated the holding in Caldwell v.Mississippi, 472 U.S. ____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and required the reversal of the sentence phase of respondent's trial.

Both the State and respondent appealed this decision to the United States Court of Appeals for the Fifth Circuit. The Court of appeals affirmed the judgment of the District Court on June 27, 1986. The Fifth Circuit, as did the District Court, relied on cases resting in a different procedural posture than that of reespondent's to reach its decision.

Because of the vititation of approximately seven decades of Mississippi law by the Fifth Circuit and the District Court, the State brings this instant petition.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit and District Court erred in concluding that the finding by the

Mississippi Supreme Court in Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983), denying coram nobis relief on the basis that respondent's claims, where forfeited because they could have been raised on direct appeal but were not, was a radicaldeparture from prior precedent. The court below further erred in refusing to hold the District Court was precluded from reaching the merits of the claim concerning closing argument absent a finding of cause under Wainwright v. Sykes. The State contends that the decision from both a historical and legal standpoint is erroneous in that the Mississippi Supreme Court has traditionally found that the scope of post-conviction review is extremely limited. Concommitantly, the Mississippi Supreme Court opinion was in specific compliance with Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982), with written findings to the effect that certain claims had been

forfeited. Finally, the lower federal courts have placed an unduly restrictive interpretation on the "lack of regular enforcement" rule discussed in Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), and by doing so have abolished the State Court's rights to remedy plain error and manifest injustice. For these reasons certiorari should be granted.

ARGUMENT

1. **CERTIORARI SHOULD BE GRANTED WHERE THE COURT OF APPEALS ERRED IN HOLDING THAT THE MISSISSIPPI SUPREME COURT DID NOT REGULARLY AND STRICTLY IMPOSE ITS PROCEDURAL BAR AND THEREFORE RESPONDENT'S CLAIM OF IMPROPER CLOSING ARGUMENT WAS NOT PROCEDURALLY BARRED FROM ITS CONSIDERATION BY WAINWRIGHT V. SYKES AND ENGLE V. ISAAC.**

The Court of Appeals and the District Court relying on Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964) held that the Mississippi Supreme Court had not clearly announced nor had

it regularly and systematically applied its procedural rule that barred a person convicted of a crime from raising claims in a post-conviction proceeding that he could have raised on direct appeal, but did not. The court below held that the failure of the Mississippi Supreme Court to clearly announce it's procedural rule or to "regularly or strictly" apply it created a situation where the federal courts did not have to honor them. In so holding the Court of Appeals was able to reach the merits of a claim of improper argument during the sentence phase of petitioner's death penalty trial and hold that it required reversal of the sentence of death because the argument violated the holding of Caldwell v.Mississippi, 472 U.S. _____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The claim of improper argument could have been raised on direct appeal, however, it was not raised until

respondent filed his application for leave to file a petition for writ of error coram nobis in the trial court (Mississippi's post-conviction proceeding at the time.) The Mississippi Supreme Court held the issue barred from its consideration for failure to object at trial and failure to raise the question on direct appeal. Wheat v. Thigpen, 431 So.2d 486, 488 (Miss. 1983). The Mississippi Supreme Court specifically relied on Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v.Isaac, 456 U.S. 107 (1982), in holding the claims to be barred. In reversing the death sentence the Court of Appeals ignored its own holdings recognizing the procedural bar in Gray v. Lucas, 677 F.2d 1086, 1109 (5th Cir.1982) (failure to submit a jury instruction on a lesser included offense) and Young v. Herring, 777 F.2d 198, 203 (5th Cir. 1985) (failure to make a contemporaneous

objection). The Fifth Circuit has even recognized a Mississippi procedural bar in a post-Wheat context. See Jones v. Thigpen, 795 F.2d 521, 522 (1986).

The Court of Appeals application of Hathorn v. Lovern, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982) and Barr v. City of Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), when considered in light of the consensus of authority decided by the Mississippi Supreme Court on this subject is simply unwarranted. Historically speaking, Barr, was the culmination of a series of cases[2] decided by the United States Supreme Court arising from a number of civil rights demonstrations in the late 1950's and early 1960's and stood for the basic proposition that

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[2] See: NAACP v. Alabama ex rel Flowers, 377 U.S. 288 (1964); Shuttlesworth v. City of Birmingham, 376 U.S. 399 (1964); Wright v. Georgia, 373 U.S. 284 (1963); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1963).

"state procedural requirements which are not strictly or regularly followed cannot deprive [the federal courts] of the right to review." 378 U.S. at 149, 12 L.Ed.2d at 769.

The question remains open as to the precise meaning of the phrase "strictly or regularly followed". To this end, there have been less than a plethora of decisions on point. For the most recent decision on this subject see: James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984). We find some guidance in the case of Bouie v. City of Columbia, 379 U.S. 347, 84 S.Ct. 1697,12 L.Ed.2d 894 (1964), a companion case to Barr. In summarizing the concept of the Barr "rule of consistence," this Court stated:

> The basic due process concept involved is the same as that which the court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court' review of a federal question. See e.g., Wright v.Georgia, 373 U.S. 284, 10 L.Ed.2d 349, 354,

83 S.Ct. 1240 (1963); NAACP v. Alabama, 357 U.S. 449, 456-458, 2 L.Ed.2d 1488, 1496, 78 S.Ct. 1163 (1958); Barr v. City of Columbia, 378 U.S. 146, 12 L.Ed.2d 766, 84 S.Ct. 1734. The standards of state decisional consistencey applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitled him. In both situations "a federal right turns upon the status of state law as of a given moment in the past - or, exactly, the appearance to the individual of the status of state law as of that moment . . . ." 109 U.Pa.L.Rev., supra, at 74, n. 34. When a state court overrules a consistent line of procedural decisions with the retroacitve effect of denying a litigant a hearing in a pending case, it thereby deprives him of

due process of law "in its primary sense of an opportunity to be heard and to defent [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L.Ed 1107, 1112, 50 S.Ct. 451. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is the Court's statement in Brinkerhoff-Farris, supra, that "if the result above stated were attained by an exercise of State's legislative process, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." Id., at 679-680, 74 L.Ed.2d at 1112, 1113.

[Emphasis added]

378 U.S. at 354-55.

When viewed in the context of the historical use of an application for leave to file a writ of error coram nobis after affirmance on direct appeal, the conclusion reached by the court below in unsupportable. While clearly there may have been a deviation or two from the strict standard over the years this conduct could clearly be laid at the feet of the Federal Judiciary. See: Fay v. Noia, 372 U.S. 391, 9L.Ed.2d 837, 83 S.Ct. 822 (1963). Accord: Goldsby v. State, 226 Miss. 20, 86So.2d 27 (1956); Goldsby v. Harpole, 249 F.2d 417 (5th Cir. 1957); Brown v. State, 173 Miss.543, 158 So.2d 339 (1935), rev'd 297 U.S. 278, 56 461, 80 L.Ed. 2d 682 (1936).

The court below has previously held that minor deviations are simply insufficient to invalidate the procedural bars imposed by a state court. Taken to its logical conclusion, the decision here is unthinkable, in that the State courts will never be allowed to invoke

its authority to remedy plain error or manifest injustice without risking total federal intervention into all cases. This is so because the plain error rule is invoked to address questions not properly preserved or properly raised by a defendant. By excusing a procedural default to address plain error the state court then fails to "regularly or strictly" apply its procedural rules. Clearly under Sykes and United States v. Frady, 456 U.S. 152,102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), such could be argued as violation of due process as an unforseen change in the law. This decision means that the state courts must give rate adherence to the rules of procedure regardless of the violation's significance.

The Court of Appeals further ignored its own precedent in Henry v. Wainwright, 686 F.2d 315 (5th Cir. 1982). It will be remebered that the Fifth Circuit originally held in Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981), that

because the Florida Supreme Court had excused procedural defaults in similar circumstances in other cases, the federal courts did not have to recognize the procedural bar Henry's case. This Court in Wainwright v. Henry, 457 U.S. 1114, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). On remand, the Court in reaching the merits of the claim stated:

> In the situation presented here, where the state court's opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied it own rules to reach and reject the claim on the merits.[3]

---

[3] Otherwise, federal review would unjustly be denied a prisoner who has no way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

> The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to Florida law to determine what the state courts have done in the case before us. This is a necessary accepted analysis in habeas cases. See, e.g. County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979.
>
> [Emphasis added] 686 F.2d at 314.

The Mississippi Supreme Court clearly imposed the procedural bar in this case refusing to excuse the procedural default. The Court of Appeals although presented with arguments concerning the precedent in Henry, did not even mention it the opinion.

Even more surprising we find the the precedent established in Bass v. Estelle, 696 F.2d 1154, reh'g. denied, 705 F.2d 121 (5th Cir. 1983), similarly ignored. A similar claim was made in Bass. The Court stated in footnote 4:

> 4. Bass also appears to contend that since on occasion the Texas court addresses the merits of claims which it might have viewed as waived, and that when it does so we consider ourselves authorized to do likewise, e.g., Burns v.Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc 626 f.2d 396 (1980), we must disregard the state's contemporaneous objection rule in all cases. We have recently rejected this contention. Speaking of our practice of reaching the merits where the state court has done so, rather than resting on procedural default, we explained:

Otherwise, federal review would unjustly be denied a prisoner who has not way of proving that the state courts did consider the merits of his claim. This presumption does not unduly infringe upon the comity considerations underlying Sykes and Isaac, for all a state must do to preclude federal examination of an alleged error, contrary to state procedural rules, is to indicate that it has found the claim to be procedurally barred.

The appellant asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default on another case allows a federal court to excuse a default in a case where the state courts have not. Instead we have looked to Florida law to

> determine what the state courts have done in the case before us. This is a necessary, accepted analysis in habeas cases. See, e.g. County Court v. Allen, 442 U.S. 140, 149-51, 99 S.Ct. 2213, 2220-22, 60 L.Ed.2d 777 (1979). Henry v. Wainwright, 686 F.2d 311, 314 n. 4 (5th Cir. 1982).

[Emphasis added] 696 F.2d at 1157-58.

On petition for rehearing in Bass the Court of Appeals stated:

> As for the second contention, we do not regard an occasional act of grace by the Texas Court in entertaining the merits of a claim that might have been viewed as waived by procedural default to constitute such a failure to strictly or regularly follow the state's contemporaneous objection

rule as permits us to disregard that rule generally, or where the state court has not done so. The basis of this claim is Barr v. Columbia, 378 U.S. 146, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964), a civil rights case in which the Court refused to accept the generality of exceptions as an independent and adequate state ground barring constitutional review, where the Court was able to point to four separate decisions from the same state court, all handed down within weeks of that before it for review, deeming identical exceptions sufficient. Such selective constructions of identical language are a far cry from our case. Moreover, we do not regard as dicta the language quoted by us in our original opinion from Henry v. Wainwright, 686 F.2d 311, 314 n. 4 (1982); and since it is not we are bound by it. Instead, it is a holding, voiced in response to a party's contention, that we will not excuse a procedural default in a case where state courts have not

> done so. Until such constructional legerdemain as occurred in Barr is drawn before us, we see no occasion to contention, that we will not excuse a procedural default in a case where state courts have not done so. Until such constructional legerdemain as occurred in Barr is drawn before us, we see no occasion to re-examine that holding; and no such thing is apparent here.705 F.2d at 122-23.

See: Booker v. Wainwright, 764 F.2d 1371, 1378-80 (11th Cir. 1985) (Addressing regular enforcement of procedural bar of failure to raise question on direct appeal.)

The conclusion is inescapable that even where a procedural bar exists it does not have to be applied in every instance conceivable in order to survive a challege against its regular and systematic enforcement. In holding that it has to be applied in every instance that it could conceivably be applied, the Court of

Appeals has clearly circumvented the proscription in Sykes and Isaac against the federal court's intrusion into such areas.

In reaching the flawed conclusion that Mississippi has never clearly announced, nor does it regularly and systematically apply its procedural bar, the Court of Appeals relied on cases in a totally different procedural posture from that of respondent's case. In Mississippi prior to 1984, petitions for post-conviction relief fell into two categories; (1) petitions for writ of error coram nobis filed in the trial court when no appeal has been taken from the conviction or guilty plea and (2) applications for leave to file a petition for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court in situations where the conviction and sentence have been affirmed on appeal. In re Broom's Petition, 168 So.2d 44, 48 (1964), set forth the distinction between these two types of post-conviction proceedings. Traditionally

in cases where no appeal was taken the conviction and sentence are not accorded the same finality those affirmed on appeal are accorded. Therefore when a petition was filed in the lower court, where no appeal had been taken, the trial court could address the merits. This decision could then be appealed to the state supreme court and the Mississippi Supreme Court would address the merits of properly preserved questions raised as it would in any other direct appeal.

However, in the second category, if a conviction and sentence had been appealed and affirmed, it takes on a different mantel of finality. The only way that a post-conviction petition could be brought after affirmance on appeal was under the provisions of Miss. Code Ann., § 99-35-145 (1972) (Repealed April 17,1984, by § 99-39-1 et seq., Miss. Code Ann. (Supp. 1984)). Section 99-35-145 provided that after affirmance on appeal an application for

leave to file a petition for writ of error coram nobis in the lower court must be filed with the Mississippi Supreme Court. The Court would then consider the application and either deny it or grant leave to file in the lower court. The only questions the court traditionally considered on the merits in a application for leave to file were questions of ineffective assistance of counsel [793 F.2d at 625, n.3], newly discovered evidence and the effect of intervening decisions of the United States Supreme Court on convictions, other issues were held to be barred.

Respondent's case falls into this second category as he appealed his case and his conviction and sentence were affirmed on that appeal. From 1956 until the time of the decision in respondent's case, in 1983, there are only twenty-four (24) written opinions in cases in the same posture as petitioner's

case. These cases are: Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983); Callahan v. State, 426So.2d 801 (Miss. 1983); Culberson v. State, 412 So.2d 1184 (Miss. 1982); In re Jordan, 390 So.2d 584 (Miss. 1980); Bell v. Watkins, 381 So.2d 118 (Miss. 1980);Auman v. State, 285 So.2d 146 (Miss. 1973); Spears v. State, 278 So.2d 443(Miss. 1973); Brown v. State, 275 So.2d 103 (Miss. 1973); Holloway v. State, 261So.2d 799 (Miss. 1972); Murphree v. State, 222 So.2d 694 (Miss. 1969); Irving v.State, 194 So.2d 239 (Miss. 1967); Yates v. State, 189 So.2d 917 (1966); Thompson v. State, 188 So.2d 239 (Miss. 1966); Fondren v. State, 187 So.2d 327(Miss. 1966); Riley v. State, 183 So.2d 819 (Miss. 1966); Riley v. State, 182So.2d 397 (Miss. 1966); In re Woodruff's Petition, 179 So.2d 268 (Miss. 1965); In re Broom's Petition, 168 So.2d 44 (Miss. 1965); Harvey v. State, 168 So.2d 49 (Miss. 1964); Thornhill v. State, 149 So.2d 27 (Miss. 1963); Kennard v. State, 148 So.2d 660 (Miss. 1963); Rogers v. State, 130

So.2d 856 (Miss. 1961); Conn v. State, 123 So.2d 859 (Miss. 1960); Lang v. State, 92 So.2d 670 (1957).

The Court of Appeals, for the most part, ignored these cases and instead relied mainly on cases in the first category on which to base its decision that Mississippi did not clearly announce or regularly enforce its procedural bar. The state would submit the cases in the same procedural posture as respondent's are the cases that the Court must consider in determining whether or not the procedural bar is clearly announced and regularly and systematically applied in light of Hathorn, Barr, Bass and Henry.

The Court of Appeals admits it did not do an exhaustive review of cases where the Mississippi Supreme Court has decided error coram nobis cases. This is quite evident. This is the fatal flaw in the premise of the

Court of Appeals decision. Feeling that some indepth consideration is necessary we proceed.

As noted during the time period between 1956 and the 1983 date of petitioner's application, the Mississippi Supreme Court decided, with written opinion, twenty-four (24) cases in the same procedural posture as that of respondent's case, i.e., an application for leave to file a petition for writ of error coram nobis in the lower court filed with the Mississippi Supreme Court, as allowed by Section 99-35-145, Miss.Code Ann. (1972) (Repealed April 17, 1984, by Section 99-39-1, et seq.).

In the opinion of the Court of Appeals the court recognized that ineffective assistance of counsel claims are treated differently than other claims. 793 F.2d at 625, n. 3. Of the twenty-four (24) cases listed above, six (6) cases contained questions of ineffective assistance of counsel, in some they were addressed on the merits and in others they were

they were held to be barred. Callahan; Culberson; Bell; Yates; Fondren; Thornhill; Rogers. These cases cannot form the basis of holding that Mississippi does not impose its procedural bar regularly and systematically as it does not impose a bar until a defendant has had at least one opportunity to have his claim of ineffectiveness addressed. Read v. State, 430 So.2d 832 (Miss. 1983).

Another type of claim comes in for special treatment as we mentioned above. This is a claim of newly discovered evidence that the Mississippi Supreme Court created a procedure for raising in Lang v. State. This claim by its very nature must have its merits examined, first to see if the petitioner new or should have known of this claimed new information at the time of trial. If he did then a bar will be imposed. Secondly if it was not then the Court must look at the merits to determine if it falls into the preview of Lang. See: Kennard; Murphree.

Of the twenty-four (24) applications written on by the Mississippi Supreme Court only four (4), arguably, have been addressed on the merits. In 1965, the Mississippi Supreme Court spoke to the meirts in In re Woodruff's Petition, the reason the Court did so was that petitoner's counsel had perfected an appeal, but never filed a brief. The appeal was dismissed for lack of prosecution. The Court treated the dismissal as an affirmance and allowed an application for leave to proceed in the lower court to be filed. It is clear that the case was addressed on the merits because counsel had failed in his duty to file briefs of assignment of errors. This was an ineffective assistance of counsel case and therefore not subject to a bar. Therefore, no procedural bar was imposed.

The next case in which there was a failure to impose the procedural bar was Thompson v. State. The Court stated its reason for not imposing the bar as follows:

> Since there is some doubt[1] raised as to whether or not there is an effective waiver of a federal constitutional right by the failure to raise such right during the trial, we are of the opinion in the instant case that the petition for a right to file an application for writ of error coram nobis should be allowed, and petitioner should be permitted to file a petition in the Circuit Court of Attala County, Mississippi.

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[1] Henry v. State of Mississippi 379 U.S. 433, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

188 So.2d at 239.

Here it is clear that the confusion over the opinion in Henry v. Mississippi, 379 U.S. 433 (1965), caused this result in this 1966 decision. This confusion evidently lasted to some extent until the Court, when imposing the bar in Harley v. State, 264 So.2d 406 (Miss. 1972), held:

In the case of Henry v. State, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408(1965), the United States Supreme Court stated that:

> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. . . . " 379U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413.

It is clear that objection to the action of the court in appointing persons as bailiffs who are later called as witnesses must be made at the time when the bailffs are called as witnesses, or if known, at the time when they are appointed by the court.

. . .

We hold that the trial court was correct in dismissing the petition for writ of error coram nobis in this case, because the

> alleged error was not brought to the attention of the trial court during the trial of the original case.
>
> 264 So.2d at 408.

Harley was an appeal from denial of error coram nobis relief in the lower court which puts it into the other category of error coram nobis cases, but the indication is clear that the Court had cleared the doubts in its mind relating to the Henry decision.

Bell v. Watkins, cited by the Court of Appeals as a decision on the merits is simply not a decision on the merits of every question raised in the application. The opinion in Bell is mainly a chronical of the course of proceedings the case had taken up to the point of the petition under consideration. The only merits the Court actually spoke to were the claim of newly discovered evidence not available at the time of trial and the claim ineffective assistance of counsel. As noted above, these matters are ones generally

excepted from the procedural bar. The Court points out that is considering only these claims and the others are in fact not new claims, but ones presented on prior petitions. The Court stated:

> The petitioner alleges that facts and/or legal issues raised in this complaint in the nature of a petition for writ of error coram nobis and/or a writ of habeas corpus came to the attention of petitioner after the decision of this Court rendered May 24, 1978. A copy of the complaint is attached hereto as Exhibit "C".
>
> The Court, sitting en banc, has carefully and meticulously considered each allegation of the petitioner's complaint in the nature of a petition for writ of error coram nobis and/or petition for writ of habeas corpus. Some of the allegations have now been considered by the Court in this case no less than four times.

> We have given particular attention to the petitioner's allegations with reference to his claim of inadequacy of counsel, and after a review of the record and trial allegation is particularly lacking in merit for any of the reasons assigned by the petitioner. Trial counsel diligently and able represented the petitioner at every stage of the proceedings.
>
> We are of the opinion that the petitioner, Charles Sylvester Bell, received a fair trial by a jury of his peers in conformity with the laws of the State of Mississippi and the Constitution of the United States; and, the verdict of the jury. and sentence imposed upon his were amply supported and justified by the evidence beyond a reasonable doubt.
>
> 381 So.2d at 119.

The Court considered only the newly discovered evidence claim and the ineffective assistance of counsel claims on the merits. In any event the State did not raise the bar in the defense of this case. What we have in Bell, is a waiver of waiver situation. The State simply

waived its right to rely on the procedural bar in the case by not raising it before the Mississippi Supreme Court. See: Young v. Herring, 777 F.2d at 204; Bell v. Watkins, 692 F.2d 999 (5th Cir.1982); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). The blame for not imposing the bar against the claims can be laid at the feet of the State in this case not the Mississippi Supreme Court. The Mississippi Supreme Court has imposed the bar when the State relied on that theory to defend the case. This waiver of waiver doctrine was applied by the Court of Appeals in its decision in Bell v. Watkins.

Again in In re Jordan, supra, the State failed to raise the procedural bar as its defense to the case and the decision of the Mississippi Supreme Court is clearly on the merits. The waiver of waiver doctrine applies here also. These are the cases that the Mississippi Supreme Court addressed on the merits.

The Court of Appeals cited Culberson v. State, 412 So.2d 1184 (Miss. 1982), as a decision on the merits. 793 F.2d at 625, n. 3. The Court is wrong. The Mississippi Supreme Court's opinion in Culberson does not address the merits. The opinion only states that there is one issue that requires an evidentiary hearing: an ineffective assistance of counsel claim. This fact is borne out by the opinion on appeal from the denial or relief by the trial court. When Culberson filed his petition in trial court he raised every issue that had been presented to the Mississippi Supreme Court in his application there. The trial court refused to hear them because it found no jurisdiction to do so. Culberson then raised the refusal to hear the claims on direct appeal from denial of the writ. The Mississippi Supreme Court in Culberson v. State, 456 So.2d 697 (Miss. 1984), held:

> We consider only this assignment of error [ineffective assistance of counsel] for the following reason: Under the Court's order granting permission to file the Petition for Writ of Error Coram Nobis, the court at that time fully considered all reasons for requesting the petition and found that only one question could or should be considered by the trial court under the petition. This was, as herein before stated and as stated in the first assignment of error now before us, that Culberson was allegedly refused permission to testify at his trial.
>
> All of the other assignments of error now presented in this appeal either previously have been disposed of by this Court or all are procedurally barred, except the question granted as to whether or not Culberson was refused permission to testify. A careful study of the opinions heretofore cited confirms these statements.
>
> [Emphasis added] 456 So.2d at 698.

Therefore it is clear that the procedural bar was imposed in Culberson.

The Court of Appeals also relied on Phillips v. State, 421 So.2d 476, 483 (Miss. 1982), as stating that "constitutional defects" will be considered, although not raised on direct appeal. Phillips is a direct appeal from the denial of a writ of error coram nobis in the trial court, putting it in the other category of error coram nobis cases. The language in Phillips is referring to the appellants constitutional claim that a prior Kentucky conviction, relied on to sentence him as an habitual offender, was obtained in violation of Boykin v. Alabama, 395 U.S. 238 (1969). The remedy he had available to him if the Kentucky conviction were voided was to apply to the Mississippi Supreme Court for leave to file a petition for writ of error coram nobis challenging the jurisdiction of the court to impose the sentence. Lack of jurisdiction because of a defective indictment

can be raised at any time in Mississippi. Echols v. State, 180 So.2d 630 (Miss. 1965). In order to be sentenced as an habitual offender in Mississippi the indictment must set out the two prior convictions. See: Miss. Code Ann. §99-19-81 (Supp. 1977); Osborne v. State, 404 So.2d 545 (Miss. 1981). Phillips claim on error coram nobis would stand in the position of a newly discovered evidence case.

The section relied on by the Court of Appeals form In re Broom's Petition, 168 So.2d 44, 48 (Miss. 1964), refers to petitions for writ of error coram nobis filed in trial courts where no appeal was ever taken to the Mississippi Supreme Court. This is clearly pointed out in the next paragraph of the opinion, where the Mississippi Supreme Court states:

> In summary, excepting those cases to which coram nobis under section 1992.5 is applicable, a prisoner is custody of the state, claiming the right to be released

> or to a new trial upon the ground that his sentence was imposed in violation of the Constitution of or to a new trial upon the ground that his sentence was imposed in violation of the Constitution of the United States or the State of Mississippi, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentenced to vacate, set aside or correct the sentence and grant a new trial, or may file a petition of like nature for a writ of error coram nobis for similar relief.
>
> [Emphasis added] 168 So.2d at 48.

The Section 1992.5, referred to was the earlier codification of §99-35-145, Miss. Code Ann. (1972). Broom, set forth the distinction between error coram nobis in the trial court and error coram nobis in the Supreme Court after affirmance on appeal that we have been speaking of and the Court of Appeals has ignored. Broom makes it clear that petitions from denials of writ of error coram nobis have

always been treated differently than those where there has been an appeal and affirmance by the Mississippi Supreme Court. In deciding if the Mississippi Supreme Court has regularly applied the procedural bar in cases similarly situated with that of petitioner's we must look to the twenty-four cases dealing with application to file petitions for writ of error coram nobis in the lower court filed in the Mississippi Supreme Court. The forty-five (45) other cases dealing with petitions for writ of error coram nobis filed in the trial court and then appealed to the Mississippi Supreme Court that also have written opinions have no application here.

The Court of Appeals cites us to Fondren v. State, 199 So.2d 625 (Miss. 1967), as a case in which the court reached the merits of a claim not assigned as error on direct appeal.

A cursory reading of Fondren will clearly show that it is anappeal from denial of a writ of error coram nobis by a trial court. Further it is a case of ineffective assistance of counsel and therefore not one coming under the procedural bar rule. The Mississippi Court states in Fondren:

> The state concedes that there was no waiver of appellant's right to object, since the proof shows that he was not advised of his rights by prior counsel. It should be noted that this question should not arise in future cases provided the trial judge takes the precaution to ascertain at the time of defendant's arraignment whether the defendant is aware of his constitutional right to object to the composition of the grand jury that indicted him and the trial jury that is to try him.
>
> [Emphasis added] 199 So.2d at 626.

The state admitted that petitioner received ineffective assistance of counsel by failure to properly advise him of his rights to object to

the composition of the grand jury. Fondren, stands for nothing in the context of this case as it is an ineffective assistance of counsel case.

One last area where the Mississippi Supreme Court will entertain the merits of a claim on application for leave to file a petition for writ of error coram nobis is where there has been an intervening decision by the United States Supreme Court that has retroactive application and could invalidate a conviction altogether. In Spears v. State, 278 So.2d 443 (Miss. 1973), the state court considered whether petitioner's conviction for abortion should be set aside by the decision in Roe v. Wade, 410 U.S. 113 (1973). No relief was granted.

The benchmark cases in the procedural bar area in Mississippi are Holloway v. State, 261 So.2d 799 (Miss. 1972) and Auman v. State, 285 So.2d 146 (Miss. 1973). Both Holloway and

Auman clearly announce the procedural rule that a claim capable of being on direct appeal must be raised then or be forever waived. Holloway state:

> Obviously, since petitioner referred to himself in his own direct testimony given at his trial, he and his counsel knew of the "show up" or "line up." However, it was never brought to the attention of the trial court, and no question was raised at the trial level that the circumstances had been prejudicially suggestive. Nothing related to it formed any part of the evidence upon which the jury acted in convicting petitioner. There was nothing about it among the several grounds assigned in petitioner's motion for a new trial nor was it assigned or argued as error in petitioner's appeal to this Court. The trial record reflects that petitioner was fairly tried and convicted upon sufficient evidence of guilt.
>
> . . .
>
> Moreover, if there was prejudice resulting from the "show up" or "line up," the facts and circumstances were known to

> petitioner and petitioner's present objection should have been raised at trial. No such proposition was advanced or submitted to the trial court, either as a pretrial matter or in the course of the trial. Nor was it assigned as a ground in petitioner's motion for a new trial. A defendant in a criminal trial may not deliberately hold back matters known to him at the time of his trial until after the affirmance of his conviction and then, for the first time, use them to begin the whole process all over again.
>
> [Emphasis added] 261 So.2d at 800.

In Auman, the Mississippi court, in addressing an issue that was not raised on direct appeal, held, "[a]lthough this issue was not assigned or briefed as error [on direct appeal], due diligence required it to be. 285 So.2d at 147.

One last matter must be addressed and this is the reliance of the Court of Appeals on the decisions by District Courts in Mississippi in the cases of Pruitt v. Thigpen, No. EC 84-31-LS-D (N.D. Miss. Nov. 21, 1984) and Edwards v.Thigpen, 595 F.Supp. 1271 (S.D. Miss. 1984). The District Court based its decision in the case at bar on Edwards. Pruitt

is also based on the holding in Edwards. The holding in Edwards is the most flawed of all as it relies on cases that are direct appeals from the original conviction and sentence, not post-conviction cases, to conclude that Mississippi has no legitimate procedural bar. The District Court in Edwards came to the conclusion that the Mississippi Supreme Court applies heightened scrutiny to death penalty cases therefore it excuses all procedural defaults. As stated all of the cases relied on emanated from direct appeal and not from a post-conviction application. In Leatherwood v. State, 435 So.2d 645 (Miss. 1983), the Mississippi Court elaborated upon its death penalty scrutiny stating:

> In cases where we feel that the asserted error has merit and that it unduly prejudiced the appellant, we may raise it as an apparent error on the fact of the record of the Court's own motion.

> Irving v. State, 361 So.2d 1360, 1363 (Miss. 1978). However, we are not required to do so by court rule or under section 99-19-105 (Supp. 1982) as claimed by the appellant. In this case we are not so persuaded and do not so move. This is consistent with prior holdings where the jury verdict was allowed to stand and similar instructions were approved. Smith v. State, 419 So.2d 563 (Miss. 1982); Voyles v. State, 362 1236 (Miss. 1978); and Bell v. State, 360 So.2d 1206 (Miss. 1978).
>
> 435 So.2d at 650.

It is clear that the "plain error" standard used on direct appeal may not be applied by a Federal Court to post-conviction proceedings. See: United States v. Frady, 456 U.S. 152, 166-67, 102 S.Ct. 1584, 1593-94, 71 L.Ed.2d 816, 829-30(1982).

The district court in Edwards did not cite, nor could it cite any cases decided by the Mississippi Supreme court applying the

"heightened scrutiny" test in any post-conviction proceeding. To the contrary it is clear from a review of the cases cited above it is beyond question that the Mississippi Supreme Court has consistently applied its conservative scope of review in deciding applications for leave to file coram nobis proceedings in the trial court in death penalty cases.

In holding that Mississippi does not have procedural bars that have to be recognized because it occasionally addresses the merits of a claim that could be waived the Court of Appeals has ignored its own precedent set forth in Henry v. Wainwright; Bass v. Estelle; Gray v. Lucas; and Young v. Herring. In holding that it can reach the merits of the claim in question the Court of Appeals has circumvented the holdings in Wainwright v. Sykes, and Engle v. Isaac. The Mississippi Supreme Court did

not announce any new rule in its decision in this case and it had clearly applied the procedural bar in question with regularity prior to the time of respondents direct appeal taking this case out of the realm of the application of Barr v. Columbia, 378 U.S. 146 (1964) or Hathorn v.Lovorn, 457 U.S. 255 (1982).

CONCLUSION

For the above and foregoing reasons petitioner's respectfully submit that the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Petition for Certiorari to the Court of Appeals for the Fifth Circuit, to the following:

Robert Morin, Esq.
419 Seventh Street, N.W.
Suite 201
Washington, D.C. 20004

and

Stephen B. Bright, Esq.
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Atlanta, GA 30303

This the 12th day of December, 1986.

Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Kenneth W. Wheat, Petitioner-Appellee

Cross-Appellant,

v.

Morris Thigpen, Commissioner, Mississippi Dept. of Corrections, et al., Respondents-Appellants, Cross-Appellees

No. 85-4590.
United States Court of Appeals,
Fifth Circuit.

June 27, 1986.

Before GEE, REAVLEY and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge.

In this federal habeas action, the respondents, Morris Thigpen, Commissioner of the Mississippi Department of Corrections, and others (collectively the State), appeal the district court's order vacating the petitioner's death sentence. The petitioner, Kenneth William Wheat, appeals the district court's denial of relief as to the guilt-innocence phase of his trial. We affirm the order of the district court in all respects.

I.

A Mississippi jury found Wheat guilty of capital murder in 1980 and imposed the death penalty. Wheat's lawyers took a direct appeal to the Mississippi Supreme Court and filed an opening brief before Wheat dismissed them. Based on Wheat's opening brief and the State's response, the Mississippi Supreme Court affirmed the conviction and sentence. Wheat

v. State, 420 So.2d 229 (Miss. 1982), cert. denied, 460 U.S. 1056, 103 S.Ct. 1507, 75 L.Ed.2d 936 (1983). Following the United States Supreme Court's denial of certiorari in the direct appeal, another set of lawyers filed, on Wheat's behalf, a Petition for Leave to File a Writ of Error Coram Nobis with the Mississippi Supreme Court, raising several issues previously raised in the direct appeal and raising several issues not raised in the direct appeal. The court denied the petition on the ground that Mississippi law procedurally barred all the issues raised by Wheat. The court held that Mississippi law barred the issues previously raised because Wheat had previously litigated them and that Mississippi law barred the issues not previously raised because Wheat waived them by not raising them on direct appeal. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983).

After the Mississippi Supreme Court denied his Petition for Leave to File a Writ of Error Coram Nobis, Wheat filed a Petition for Writ of Habeas Corpus with the United States District Court for the Southern District of Mississippi. The district court conditionally granted the writ as to the sentencing phase of the trial, conditioned on Mississippi conducting a new sentencing hearing or deciding to impose a sentence less than death. The district court found no merit to any of Wheat's claims attacking the guilt-innocence phase of the trial and refused to grant the writ as to that portion of the trial. The State appeals the partial conditional grant of the writ of habeas corpus, and Wheat appeals the denial of the writ as to the guilt-innocence phase of his trial.

II.

We address first the State's complaints about the district court's ruling on the sentencing phase of Wheat's state court trial.

The court ruled that the prosecutor's closing argument at the sentencing phase of the trial violated the eighth amendment. While the state does not dispute the court's conclusion that the prosecutor's argument violated the eighth amendment, the State argues: (1) that the district court erred in finding that it could reach the eighth amendment question and (2) that the district court erred in not finding that comments made by defense counsel invited the prosecutor's error.

A.

The State argues that the federal district court could not reach the eighth amendment question because Mississippi procedure barred the raising of claims, in a post-conviction proceeding, not previously raised in the direct appeal. The State further argues that its procedural bar rule is entitled to respect as an "independent and adequate state ground" and

that the district court violated this principle by reaching the issue raised by the prosecutor's closing argument.

[1,2] The Supreme Court "has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power." Francis v. Henderson, 425 U.S. 536, 539, 96 S.Ct. 1708, 1710, 48 L.Ed.2d 149, 152 (1976) (citing Fay v. Noia, 372 U.S. 391, 425-26, 83 S.Ct. 822, 841-42, 9 L.Ed.2d 837 (1963)). One way the Court implements these considerations and concerns is by prohibiting the federal courts from reviewing state decisions grounded on an independent and adequate state ground. An independent and adedquate state ground may be a rule either of state substantive law or state procedural law. Henry v. Mississippi, 379

U.S. 443, 446, 85 S.Ct. 564, 566, 13 L.Ed.2d 408, 412 (1965). The Supreme Court has specifically held that a federal court may not review a habeas petitioner's federal claims when the state courts have declined to pass on the claims because of an independent and adequate state precedural ground, absent a showing of cause and prejudice. Eagle v. Isaac, 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783, 801 (1982); Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594, 608 (1977). Thus, a state procedural rule which requires a defendant to raise all his issues for relief on direct appeal will prevent a defendant from raising in federal court issues he did not raise on direct appeal.

> Applying Sykes in this setting accrues the dual advantage of discouraging defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus consideration and encouraging state

> appellate courts to enforce state procedural rules strictly, thereby reducing the possibility the federal court will decide the constitutional issue without the benefits of the state's views.

Clark v. Texas, 788 F.2d 309, 310-11 (5th Cir. 1986) (quoting Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.) (en banc), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983)).

[3] There is, however, at least one exception to the rule that a federal court will not reach an issue which the state courts refused to reach due to a procedural default. The Supreme Court has repeatedly stressed that a state procedural rule is not entitled to respect as an adequate and independent state ground unless the procedural rule is "strictly or regularly followed." Hathorn v. Lovorn, 457 U.S. 255, 262-63, 102 S.Ct. 2421, 2426, 72 L.Ed.2d 824, 832 (1982); Barr v. City of Columbia, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766, 769 (1964); see also James v. Kentucky, 466 U.S. 341, 104 S.Ct.

1830, 80 L.Ed.2d 346, 353 (1984) (only state procedural rules that are "firmly established and regularly followed ... can prevent implementation of federal constitutional rights."). As the Court recently stated: "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." Hathorn, 457 U.S. at 263, 102 S.Ct. at 2426, 72 L.Ed.2d at 833. Additionally, the state procedural rule must be "clearly announced to defendant and counsel." Henry v. Mississippi, 379 U.S. 443, 448 n. 3, 85 S.Ct. 564, 567 n. 3, 13 L.Ed. 408, 413 n. 3 (1965). If the state does not clearly announce the procedural rule or the state courts do not strictly or regularly follow the procedural rule, then the federal courts may reach the issue the state court refused to address. Barr, 378 U.S. at 149, 84 S.Ct. at 1736, 12

L.Ed.2d at 769.

[4] The State argues that Mississippi procedure prevents a defendant from raising, in a post-conviction proceeding, claims which the defendant did not raise on direct appeal. While Wheat admits that he did not raise the claim concerning the prosecutor's closing argument on direct appeal, he argues that Mississippi procedure, at the time of his appeal, did not prohibit the raising of claims for the first time in a post-conviction proceeding. Wheat further argues that, if Mississippi procedure did prohibit the raising of claims for the first time in a post-conviction proceeding, proceeding, Mississippi did not strictly or regularly enforce the rule and did not clearly announce

the rule to defendants and their counsel. We now turn to the question of whether the procedural bar applied by the Mississippi Court prevents federal review of Wheat's claim of improper prosecutorial argument.

Post-conviction review in Mississippi historically occurred through use of a writ of error coram nobis,[1] filed with the Mississippi Supreme Court. While the State cites numerous cases for the proposition that the scope of review on writ of error coram nobis is narrow and that the court will not address issues which could or should have been litigated at trial or on direct appeal, few of the cases are

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[1] While uncertainty existed at the time of Wheat's petition for post-conviction relief as to the proper procedure for applying for relief, one accepted procedure was the writ of error coram nobis. Edwards v. Thigpen, 433 So.2d 906, 907 n. 1 (Miss. 1983).

from the twenty-year period preceding Wheat's petition. Additionally, some cases indicate that the court will review constitutional claims on writ of error coram nobis although the defendant did not raise them on direct appeal.[2] Furthermore, the practice of the Mississippi Supreme Court indicates that in death penalty cases the court does not consistently follow the narrow scope of review outlined in some of its opinions.

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[2] In Phillips v. State, 421 So.2d 476, 483 (Miss. 1982), the Mississippi Supreme Court stated that the writ of error coram nobis may be used to raise "constitutional defects." In In re Petition of Broom, 168 So.2d 44, 48 (Miss. 1964), the court stated that the writ of error coram nobis "is also available to correct an infringement of the constitutional rights of an accused."

In the years immediately preceding Wheat's appeal the Mississippi Supreme Court routinely reviewed claims made for the first time on writ of error coram nobis.[3]

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[3] In the two decades preceding Wheat's petition the Mississippi Supreme Court repeatedly ignored its rule prohibiting the raising of claims for the first time on writ of error coram nobis, if in fact the rule existed. In Culberson v. State, 412 So.2d 1184 (Miss. 1982), the court considered an ineffective assistance of counsel claim and several other claims raised on a writ of error coram nobis. The petitioner had not raised the claims on his direct appeal. Yet the court considered all the petitioner's claims and granted the writ to allow the petitioner an evidentiary hearing on his ineffective assistance of counsel claim. As the State correctly points out, Mississippi reviews claims of ineffective assistance of counsel differently than other claims, see

(Footnote 3 Continued)

Read v. State, 430 So.2d 832 (Miss. 1983), and allows a petitioner to raise such claims in a post-conviction proceeding; however, the State ignores the fact that the court also reviewed all the other claims presented by the petitioner for the first time on writ of error coram nobis. In In re Jordan, 390 So.2d 584 (Miss. 1980), the Mississippi Supreme Court considered and rejected claims raised for the first time on writ of error coram nobis. The court considered the issues so the petitioner could exhaust his state remedies and proceed with a federal habeas corpus action. Had the court desired to assert a procedural bar in an effort to prevent federal review of the petitioner's claims, Jordan provided a clear-cut case for assertion of the bar. Yet the court failed to assert any procedural bar and reviewed the merits of the claims so as to allow the petitioner federal review of his claims. The court acted similarly in Bell v. Watkins, 381 So.2d 118 (Miss. 1980). In Bell the court again considered claims raised for the first time on writ of error coram nobis in order to allow a petitioner to exhaust his state remedies and proceed with a federal habeas corpus action. In Fondren v. State, 199 So.2d 625 (Miss. 1967), when considering a writ of error coram nobis, the cort reached the merits of a claim not assigned as error on the direct appeal and granted relief to the petitioner.

(Footnote 3 Continued)

Additionally, two other federal district courts sitting in Mississippi have held that the same procedural bar invoked by the Mississippi Supreme Court in the instant case did not constitute an adequate and independent state ground. Pruitt v. Thigpen, No. EC84-31-LS-D (N.D.Miss. Nov. 21, 1984); Edwards v. Thigpen, 595 F.Supp. 1271, 1278 (S.D.Miss.1984) ("In this case the petitioner had every reason to expect that the Mississippi Supreme Court would address the merits of his petition for a writ of error coram nobis and should not be unjustly penalized for the Mississippi Supreme Court's announcement of a change in its procedural policy with regard to death penalty cases."). While we do not claim that our review of cases where the Mississippi Supreme Court reviewed claims raised for the first time on writ of error coram nobis is exhaustive, we believe our review sufficiently indicates that the court did not "strictly or regularly" follow its procedural bar rule or apply the rule "evenhandedly" when considering Wheat's petition.

The first case where the court expressly declares that it will not consider claims raised for the first time on writ of error coram nobis is the case involving Wheat's petition. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). In a series of cases following Wheat the court repeatedly held that it would not consider claims raised for the first time on writ of error coram nobis. King v. Thigpen, 441 So.2d 1365 (Miss. 1983); Evans v. State, 441 So.2d 520 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983). Yet, on at least one occasion following the court's announcement that it would not consider claims not raised on the direct appeal, the court has addressed the merits of a claim raised for the first time after the direct appeal. Caldwell v. State,

481 So.2d 850 (Miss. 1985).[4] We also note that the State admits in a brief filed in another case that the Mississippi Supreme Court "has in the past considered with few exceptions all claims, either on direct appeal or in a post-conviction petition, presented to it." Respondent's Response to Application for Leave to File a Petition for Writ of Error Coram

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[4] Following the United States Supreme Court's vacation of his death sentence, Caldwell filed a motion with the Mississippi Supreme Court requesting that the court vacate or set aside his conviction for capital murder. The court proceeded to consider issues not raised on direct appeal and overruled the motion.

Nobis and/or Writ of Habeas Corpus at 22, Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983).[5] We are therefore persuaded that the

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[5] Wheat introduced the State's Response in Edwards as an exhibit below. In the Response the State noted that in five of the first six capital cases to reach the federal courts, the federal court granted habeas corpus relief based on federal claims which the defendants had raised for the first time in state court in a petition for writ of error coram nobis. After stating that "the time has come in light of certain events which have transpired within recent history for this Court to review its chartered course in capital cases and to reconsider certain concepts," the State urged the Mississippi Supreme Court to apply procedural bars as a means to prevent federal review of those constitutional claims first presented on petition for writ of error coram nobis in order to prevent a "Crash Upon the Rocky Shores of the Federal Juidciary." The State urged the court to recognize that "the power to halt this trend and recoup control ... waits, but to be firmly seized" and that "should [the Mississippi Supreme Court] continue to enforce the 'no holds barred' concept embodied in the Irving-Culberson-Landy line of cases [ruling on the merits of claims] ... it

(Footnote 5 Continued)

will ultimately abdicate its position as the Supreme Court of the State of Mississippi and vest that authority in the United States Court of Appeals for the Fifth Circuit...."

While we understand the State's desire to shorten the lengthy litigation following capital sentences, the State ignores United States Supreme Court precedent when it urges the Mississippi Supreme Court to apply, in order to prevent federal review, procedural bars which the court has not clearly announced or strictly or regularly followed. The court's announcement of procedural bars will prevent federal review only in those cases arising after the announcement of the bar. We also note that the purpose of procedural bars is to force parties, for sound reasons, to raise their claims in a timely manner, not to completely eliminate those claims. However, the State seems to be more interested in the latter purpose.

The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interest of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case. The State not only asks that we refuse to address Evans' claims on their merits but unashamedly further seeks our aid in avoiding litigation of Evans sixteen federal constitutional claims in any federal court.

(Footnote 5 Continued)

Evans v. State, 441 So.2d 520, 531 (Miss. 1983) (Robertson, J., dissenting) (emphasis in original) (footnote omitted). The three dissenters in Evans also found the majority's new-found "affection for procedural bars to be particularly unseemly" because the State made an "undisguised demand that this Court assume an adversary position" after the federal courts vacated seven death sentences due to constitutional violations. Id. at 531-32. We also share the dissenters' concerns. The SWtate should be concerned with implementing procedural bars so that defendants will raise possible consitiutional violations at trial and on direct appeal, thereby conserving judicial resources and resolving claims when the evidence remains fresh and readily available. The State should not be concerned with eliminating a defendant's chance to raise constitutional claims without first telling the defendant when he must raise his claims or else waive them.

Mississippi Supreme Court had not clearly announced or strictly or regularly followed the procedural bar at the time of Wheat's direct appeal. Thus, no independent and adequate state grounds exist to prevent federal review of Wheat's claim concerning the prosecutor's closing argument.

B.

[5] The State next argues that the district court erred in not excusing the prosecutor's unconstitutional argument because certain comments made by defense counsel allegedly "invited" the prosecutor's error. Wheat's counsel in argument sought to impress on the jury the gravity of their responsibility. His counsel further urged the jury not to impose the death penalty because a possibility existed that Wheat did not commit the murder and because, if the jury imposed the death sentence and the State executed Wheat, and the police

later found the real culprit, the death sentence could not be reversed.[6] The prosecutor responded to the closing argument of

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[6] Wheat's counsel argued as follows:

I approached you yesterday and told you how heavy a burden that I felt. If I felt a heavy burden yesterday, I feel like I have the weight of the world on my shoulders today.

You know, I can't imagine what it would be like, truthfully, to be in your position. I guess, maybe, you can imagine what it would be like to be in my position, knowing that what you say may actually have a great determination whether a man lives or dies. I can't imagine what it would be like to sit on a jury like you are, and have to make a decision as to whether a man is killed or not. I truthfully can't. I don't know if it's hard, never having been in the position, and I just can't imagine it.

You know, what you decide here today when you go out of here, when you come back, the decision if he should be killed, somewhere, it may take-truthfully the way appeals go, it may take two or three years. But someday, just as sure as we're here now, they'll take that man over there, and they'll walk him into a little gray-looking chamber- I've seen it before-

(Footnote 6 Continued)

a little eight-sided thing, about, maybe, a little bit bigger than that witness box, and there's a metal chair that's got leather straps to it, and they'll strap him in there. And it's got glass where people can look through it. And they have a man who stands over behind there where people can't see him, and he pulls the little lever; and these little tablets drop in there, and it makes a gas, cyanide gas. And it comes into there, and they have things, I think, strapped to the body to check the heartbeat, and so forth. They stay in there until they're dead, and then they bring them out. Someday, I want you to understand that; someday-. I'm not doing this to be morbid with you. I'm doing it to make sure that you really understand the gravity of the thing.

* * * * * *

Now, I said all of that to say this: You can be wrong about it. People can be wrong. It's just that simple. No matter what, no matter what a thing looks like, you can be wrong about it.

Now, you have said by your verdict that you believe that he killed him, and that you have no reasonable doubt of it. But consider, what if? Consider that possibility. What if I'm wrong? What if it really wasn't him. If you come back with a sentence of death, it can never be reversed. Once he's dead, he's gone. He'll never be brought back if you're wrong. But what if you're wrong? What if there is a man, really, out there. That man who I argued about yesterday. What if he really exists? Consider that

Wheat's counsel by outlining the process of state and federal appellate and habeas review.[7]

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[7] The prosecutor argued as follows:
And another thing Mr. Stegall said, Kenneth Wheat still gets another chance even if you find that he should suffer the penalty of death. This will not happen tomorrow. It will not happen next. It will not happen next year. Why? Because, in the first place, there will be so many different panels reviewing your decision as to see if you made the right decision. First, His Own Honor here, will review your decision at a later time to see if you've made any error; or if the lawyers made any errors. If the Judge finds that I have committed some type of error in this case, this Judge right here has the authority to grant another trial. If he thinks that your verdict is not in accordance with the law, he has a right to grant a new trial, and let twelve more people decide. And if he finds that he's in accordance-in accord with your verdict, then we have nine supreme court justices at our state level who will look at ever[y] word that has been spoken, that this lady has taken down, will be all transcribed into a book form. Ever[y] piece of evidence that you see will go yonder to the Supreme Court, and nine men and with all of their wisdom, and knowledge, and compassion, and mercy,

(Footnote 7 Continued)

and understanding, and legal experience will look at all of this and determine whether Kenneth William Wheat got a fair trial at the hands of you twelve people in Harrison County, Mississippi.
Then if they decide, they have a right to send it back to another jury to look at if they think we committed error in this case. If they find that no error was committed, then he has a right to go all the way to the United States Supreme Court. And this doesn't cost him one dime. Our system provides him this relief at no cost to him. And he goes all the way to the Supreme Court in Washington, where nine more men will have all of the same evidence to look at and determine whether this Judge here, or those nine judges in Jackson made a mistake. And if they find that he did, then they will send it back for a new trial. Or they can go the Federal Court route after that, and then have Federal Judges to look at and see if all the evidence was presented fairly and impartially.
So, you see, Ladies and Gentlemen, it's not like he will be killed tomorrow. Mississippi hadn't had anyone executed in a long time.

* * * * * *

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after

(Footnote 7 Continued)

you have made your decision in this case. Others will look at it, and look at your work, and see if you've made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over, because someone made a mistake. BY MR. STEGALL: May It Please The Court, I'm gonna object to that again. He's telling this jury to go ahead and do something even if it's wrong, because if it's wrong, they're gonna send it back. That's not right. I'm gonna object.
BY THE COURT: I thing the argument was allowed-it was opened up on your argument. I'll overrule it.

The prosecutor also remarked: "[J]ust remember this, if your verdict is that of the death penalty, that's not final." The prosecutor further informed the jury that, if they made a mistake, one of the reviewing courts would send the case back for retrial.

While the State does not attempt to argue that the prosecutor's argument did not violate the Constitution, see Caldwell v. Mississippi, 472 U.S. _____, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the State does argue that the comments of Wheat's counsel excuse the violation. We disagree. In Caldwell, after finding that the prosecutor's closing argument violated the eighth amendment, the Supreme Court addresses the question of whether the prosecutor's comments were a permissible response to comments made by defense counsel. The Court found that the comments made by defense counsel did not excuse the prosecutor's

argument. Id. at _____, _____, 105 S.Ct. at 2643-44, 86 L.Ed.2d at 244-45.

The defendant's counsel in Caldwell, as did Wheat's counsel, sought to impress on the jury the gravity of their decision. Id. at _____, _____. 105 S.Ct. at 2637, 86 L.Ed.2d at 236-37. Defense counsel in Caldwell also sought to convey to the jury the impression that their decision would be final: "[H]e has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision." 472 U.S. at _____, 105 S.Ct. at 2637, 86 L.Ed.2d at 236. The Supreme Court noted that the State could not explain "how the prosecutor's argument was less likely to have distorted the jury's deliberations because of anything defense counsel said." Id. at 2643, 105 S.Ct. at 2644, 86 L.Ed.2d at 244. The court then held that: "Assuming without accepting the ... position that the

defense counsel's argument invited error, it did not invite this error." Id. at _____, 105 S.Ct. at 2644, 86 L.Ed.2d at 245 (quoting Caldwell v. State, 443 So.2d 806, 817 (Miss. 1983) (Lee, J., dissenting)).

The comments made by Wheat's counsel no more invited error than did the comments made by defense counsel in Caldwell. Wheat's counsel simply sought to impress on the jury the gravity and finality of their decision, as did defense counsel in Caldwell. However, the prosecutor in the instant case responded to comments by Wheat's counsel with an argument which constituted a graver violation of the Constitution that the argument given by the prosecutor in Caldwell.[8] Thus, since the Supreme Court held in Caldwell that defense

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[8] In Caldwell the Supreme Court found unconstitutional the portion of the prosecutor's argument which informed the jury that their decision was not final and that their decision was automatically

(Footnote 8 Continued)

reviewable by the Mississippi Supreme Court. In the instant case the prosecutor went further and told the jury that, if they made a mistake, a reviewing court would correct it. This type of argument raises to an even greater degree all the concerns expressed by the Supreme Court over leading the jury "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at _____, 105 S.Ct. at 2639, 86 L.Ed.2d at 239. Arguably, even the dissents in Caldwell would have found the prosecutor's argument in the instant case unconstitutional.

> If the prosecutor in this case actually had argued to the jury that it should go ahead and impose the death sentence because it did not really matter-the appellate court would correct any 'mistake' the jury might make in choice of sentence-and if the trial judge had not corrected such an argument, I might well agree that the process afforded did not comport with some constitutional norm related to procedural fairness.

Id. at _____, 105 S.Ct. at 2649, 86 L.Ed.2d at 252 (Rehnquist, J. dissenting).

counsel's comments did not invite the prosecutor's error, and since Wheat's counsel made nearly identical comments, we find that the prosecutor's argument cannot be excused by defense counsel's comments.

We therefore affirm the portion of the district court's order granting the conditional writ of habeas corpus as to the death sentence.

III.

We now turn to Wheat's cross-appeal. Wheat argues that the district court committed two errors in finding that Wheat was competent to stand trial in 1980 and that the district court erred in ruling that the state district court properly admitted in evidence two notes authored by Wheat.

A.

[6-8] The State violates a defendant's constitutional right to due process if he is tried while legally incompetent. Bishop v.

United States, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956). The State must maintain adequate procedures to insure the defendant's right to be tried while competent. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "[F]ailure to observe procedures to protect a defendant's right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975). If the trial judge received "information which objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings, nor rationally aid his attorney in his defense," the trial judge must make further inquiry into the defendant's competence to stand trial. Lokos v. Capps, 625

F.2d 1258, 1261 (5th Cir. 1980). If the trial judge does not conduct an inquiry into competency after receiving sufficient information to raise a reasonable doubt as to competency, a procedural due process violation, commonly known as a Pate violation, occurs. The habeas petitioner carries the burden of showing that a Pate violation occurred by making a clear and convincing showing of the existence of a "real, substantial and legitimate doubt as to [his] mental capacity." Bruce v. Estelle, 483 F.2d 1031, 1043 (5th Cir. 1973) (Bruce I).

[9,10] Once the petitioner carries the burden of showing a Pate violation, the question then becomes whether the federal district court can now conduct an adequate hearing to retrospectively determine the petitioner's competency at the time of his trial. If the district court cannot conduct a

meaningful hearing, the court should grant the writ of habeas corpus. Drope, 420 U.S. at 183, 95 S.Ct. at 909, 43 L.Ed.2d at 120. If a meaningful hearing can be held, the district6 court holds a nunc pro tunc hearing as to the petitioner's competency. The petitioner bears the burden of proving his incompetency by a preponderance of the evidence. Bruce v. Estelle, 536 F.2d 1051, 1059 (5th Cir.) (Bruce II), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1970).

In the instant case, after conducting a hearing, the district court ruled that a Pate violation occurred. The State does not challenge the ruling. The district court then proceeded to determine whether it could hold a meaningful nunc pro tunc hearing. After hearing the testimony of lay and expert witnesses and reviewing various medical reports, the court ruled that it could hold a

meaning nunc pro tunc hearing. The court then conducted further hearings and reviewed additional reports and ruled that Wheat was competent to stand trial in 1980. Wheat argues that the court erred (1) in ruling that it could now conduct a meaningful nunc pro tunc hearing and (2) in finding that Wheat was competent to stand trial in 1980.

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"Both the Supreme Court and this Circuit are acutely aware of the hazards connected with retrospective competency hearings ... Nevertheless, this court has repeatedly sanctioned nunc pro tunc proceedings where there is sufficient data available to guarantee reliability." United States v. Makris, 535 F.2d 899, 904 (5th Cir. 1976) (Makris II). In Makris II we noted that the length of time between the trial and the nunc pro tunc hearing was not determinative and that "the transcript

of the trial itself may provide a solid starting point for reliable reconstruction of the facts." Id. While we recognize the contemporaneous expert medical evidence often provides the most useful evidence for determining whether a meaningful hearing may be held, we have also stated that "the recollections of non-experts (including the observations of the trial judge) who had the opportunity to interact with defendant during the relevant period may in some instances provide a sufficient base upon which a fact finder may rest his decision that even a belated determination will be accurate." Id. at 905. We have also approved the use of experts to aid the district court in determining whether the court may hold a meaningful retrospective hearing. Martin v. Estelle, 583 F.2d 1373, 1375 (5th Cir. 1978) (Martin III). The test for the district court

is whether "the quantity and quality of available evidence was adequate to arrive at an assessment that could be labeled as more than mere speculation." Bruce II, 536 F.2d at 1057.

Wheat argues that the district court erred in holding that it could now conduct a meaningful nunc pro tunc hearing. We disagree. The district court had before it the medical records covering the seventeen-year period Wheat was incarcerated in New Jersey; New Jersey released Wheat less than one year before his state court trial. The three Mississippi trial judges who participated in Wheat's trial, and the trial of a companion case, testified about their observations of and interactions with Wheat. The court further noted that numerous lay witnesses who observed Wheat around the time of his trial would be available to testify, including police

officers, jail officials, penitentiary officials, Wheat's defense counsel, and the district attorney who prosecuted Wheat. The court also relied on the opinions of two experts, a psychiatrist and a psychologist. Both experts testified that the court could conduct a meaningful retrospective competency hearing.

[11,12] We review the district court's ruling that it could conduct a meaningful nunc pro tunc hearing at the abuse of discretion level. Bolius v. Wainwright, 597 F.2d 986, 988 (5th Cir. 1979). We find no abuse of discretion here. The court had available to it medical evidence compiled both before and after Wheat's trial, the state trial transcript which included several discussions between the court and Wheat, the testimony of numerous lay witnesses who observed Wheat contemporaneously to trial, and the opinions of several

experts. The only type of evidence missing is expert medical evidence contemporaneous with the time of trial. The absence of this evidence does not compel a decision that the court may not conduct a meaningful nunc pro tunc hearing. The substantial amount of other available evidence supports the court's ruling that it could hold a meaningful retrospective hearing. We have previously stated that the trial transcript provides a "solid starting point," Makris II,535 F.2d at 904, that lay testimony may provide sufficient evidence, id. at 905, and that experts may aid the district court's determination, Martin III, 583 F.2d at 1375. Since the district court had available to it all three of these types of evidence, we find no abuse of discretion in the court's ruling that it could conduct a meaningful nunc pro tunc hearing.

Wheat next argues that the district court erred in finding that he was competent to stand trial in 1980. The Supreme Court set out the now familiar standard for determining a defendant's competency in Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824, 825 (1960): "[T]he test must be whether [the defendant]has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." Since we have affirmed the district court's vacation of Wheat's death sentence, we need only decide whether the district court correctly determined that Wheat was competent

at the guilt-innocence phase of his trial.[9]

[13] Before determining whether the district court correctly ruled on Wheat's competency, we pause briefly to note the burden of proof and standard of review. The

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9 Wheat also argues that the district court erred in its interpretation of the Dusky test when deciding whether he was competent at the time of his sentencing. Recognizing the bifurcated nature of a capital murder trial, see Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the district court conducted separate inquiries into Wheat's competency at both the guilt-innocense and sentencing phases of the trial. Wheat's argument goes only to the district court's interpretation of Dusky as applied to the sentencing phase of Wheat's trial; therefore, we need not address the argument since we have affirmed the district court's vacation of Wheat's death sentence.

burden of proving his incompetency rests on Wheat. Martin III, 583 F.2d at 1375; Bruce II, 536 F.2d at 1059. The question of competency presents a mixed question of law and fact, and a limited clearly erroneous rule applies to the district court's findings. Makris II, 535 F.2d at6 907. While the clearly erroneous rule applies to evidentiary or primary factual findings, Bruce II, 536 F.2d at 1058, we take a "hard look" at the district court's ultimate finding as to competency. Lokos, 625 F.2d at 1267.

[14] The district court conducted an extensive inquiry into Wheat's competency at his trial in 1980. The court, at Wheat's request, had Wheat committed to the medical center for federal prisoners in Springfield, Missouri, for a ninety-day period. The examining psychiatrist at Springfield, Dr. William Logan, appointed as an expert witness

under Fed.R.Evid. 706, testified that Wheat acted logically and rationally with respect to the guilt-innocence phase of his trial. Dr. Logan opined that Wheat's refusal to allow his counsel to introduce any evidence of his past psychiatric history at the sentencing phase of his trial was illogical and that Wheat did not have a rational understanding of the likelihood that he could receive the death penalty. Four other experts called by the State also agreed that Wheat was competent at the time of the guilt-innocence phase of his 1980 trial. Wheat's expert, Dr. Harold Kaufman, a psychiatrist and a lawyer, testified that he believed that Wheat was a schizophrenic; however, Dr. Kaufman made it clear that Wheat's mental disorder only affected Wheat's ability with respect to the introduction of psychiatric testimony and history at the sentencing phase of his trial.

The district court also heard testimony from

several lay witnesses who observed Wheat at the time of his trial. His trial counsel testified that, with the exception of Wheat's refusal to present psychiatric evidence at the sentencing phase, Wheat was competent and able to assist on his defense. He noted that Wheat suggested worthwhile voir dire questions, suggested questions to ask witnesses, and provided the name of an alibi witness. The district attorney who prosecuted Wheat also testified that he observed no irrational behavior on the part of Wheat at any time during either of the two trials.[10] The district court also read

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10 The first trial occurred less than two months before the second trial.

the depositions of the three state judges who presided over various proceedings involving Wheat's two trials. None of the judges recalled any unusual behavior, and two of the judges recalled being impressed by Wheat's in-court responses. The district court also examined the state trial court transcript which contained several colloquies between the court and Wheat. The colloquies reflected that Wheat was able to give coherent responses to the court's questions and was attentive to the proceedings.

We have no hesitancy in approving the district court's conclusion that Wheat failed to meet his burden of showing that he was incompetent during the guilt-innocence phase of his 1980 state court trial. All of the experts agreed that Wheat was competent at the time of the trial, the lay witnesses' contemporaneous observations indicate that he was competent,

and the state court trial transcript indicates that he was competent. After taking a "hard look" at the district court's conclusion that Wheat was competent and the case law on the subject, we believe that the district court reached the correct decision. See Bolius, 597 F.2d at 990 (district court may rely on coherent answers by the defendant at the state proceedings); Martin III, 583 F.2d at 1374 (district court may rely on testimony of lay witnesses and on the state court trial transcript); Makris II, 535 F.2d at 902-03 (district court relied on testimony of lay witnesses and rejected testimony of experts who retrospectively found the defendant incompetent).

B.

[15] Wheat's final argument for reversal of the district court's ruling is that the state trial court erred in admitting in evidence two

notes Wheat wrote while in custody prior to trial and gave to jail officials. The two notes read as follows:

> Notify my lawyer and the Sheriff that I want to plead guilty to the Mayer murder charges tomorrow and I want to be sentenced next week.
>
> /s/ Kenneth Wheat
> 12-29-79
> Kenneth Wheat
> Harrison County
> Gulfport, Mississippi

November 19, 1979

Press Release:

> I am completely innocent of the Mayer murders. In order to spare myself and my family the needless suffering of a lynch mob trial, which I'll only end in a gas chamber verdict, I've decided to plead guilty and I will not appeal. The FBI and Sheriff Hobbs have falsified evidence, pressured witnesses into lying and have fed newsmedia a bunch of lies to make me look like a kill crazy monster. In Orlando the FBI

> Orlando the FBI told me they would force Harrison County to drop murder charges if I plead guilty to Federal Judge Wood's murder and they will make sure i get a good sentence. They've pressured my two uncles in Miami to try to destroy my alibi for Woods murder. My christian faith and my clear conscience will give me the strength I need to endure forthcoming sufferings.

Although the two notes contain different dates, Wheat turned both notes over to the jail officials on the same day, November 29, 1979. Before trial Wheat moved to suppress the notes on the ground that they were involuntary confessions. The state trial court held that "the defendant was aware of his Fifth Amendment Rights and any notes that he wrote on that day were freely and voluntarily written without conviction, threats or intimidation and I will hold that they are admissible...." On direct

appeal the Mississippi Supreme Court found no error in the trial court's ruling.

In his petition for writ of habeas corpus Wheat contended that his alleged incompetency at the time of trial prevented his statements from being the product of a rational intellect and free will. Relying on Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), Wheat argued that the state court could not admit the two statements because they were confessions. Blackburn prohibits the admission of the confession of a defendant who is incompetent. Id. at 208, 80 S.Ct. at 280, 4 L.Ed.2d at 248. The district court held that the notes were not confessions and that, therefore, Blackburn did not apply. We agree. A confession is an admission of guilt. United States v. Robinson, 459 F.2d 1164, 1167 n. 5 (D.C.Cir.1972); Jones v. United States, 296 F.2d 398, 402 (D.C.Cir.1961) ("Confessions are

admissions of the crime itself."), cert. denied, 370 U.S. 913 82 S.Ct. 1260, 8 L.Ed.2d 406 (1962); see also United States v. Meagher, 531 F.2d 752, 754 (5th Cir.) cert. denied, 429 U.S. 853, 97 S.Ct. 146, 50 L.Ed.2d 128 (1976). Wheat does not confess guilt in either note; rather, h;e professes innocence and proceeds to explain why he wants to plead. Taken together, the notes are exculpatory. Thus, even if Wheat was incompetent, Blackburn would not apply. The district court correctly ruled that no constitutional error occurred.

IV.

For the foregoing reasons, we affirm the order of the district court granting conditional habeas relief as to the sentencing phase of Wheat's trial and denying relief as to the sentencing phase of Wheat's trial and denying relief as to the guilt-innocence phase.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

KENNETH W. WHEAT PETITIONER

VS. CIVIL ACTION NO. S83-0390(N)

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EDDIE LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, AND THEIR SUCCESSORS IN OFFICE, AND THE STATE OF MISSISSIPPI RESPONDENTS

MEMORANDUM OPINION

Kenneth Wheat was sentenced to death for killing and robbing a young Kentucky man who was honeymooning on the Mississippi Gulf Coast with his bride of only two days. His conviction and sentence were affirmed by the Mississippi Supreme Court. Wheat v. State, 420 So.2d 229 (Miss. 1992).[1] On direct appeal

[1] Wheat was also convicted of the capital murder of the young man's wife but was sentenced to life imprisonment. That conviction and sentence were affirmed by the Mississippi Supreme Court. Wheat v. State, 435 So.2d 1180 (Miss. 1983).

to the United States Supreme Court, certiorari was denied, Wheat v. Thipgen, 460 U.S. 1056, 103 S.Ct. 1507, 75 L.Ed.2d 936 (1983). Wheat then unsuccessfully sought post-conviction remedies in the Mississippi state courts. See Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983).

The instant habeas corpus petition alleges eleven grounds in support of the petitioner's request that this Court issue the Great Writ relative to the conviction and sentence or sentence only. By previous order of this Court, Wheat's execution was stayed pending resolution of the merits of the petition. In the interim, this Court has received and read exhaustive briefs of the parties on the issues, conducted two evidentiary hearings, committed the petitioner to a federal hospital facility for psychiatric and psychological examination, and carefully reviewed the entire state court trial transcript.

A recapitulation of the facts and circumstances surrounding this tragic slaying is not necessary. They are amply recited and summarized in previous state court opinionsand, in any event, are largely irrelevant to the federal constitutional issues which we must decide. Therefore, unless necessary to a complete understanding of our ruling, the facts of the crime will not be repeated.

I.

The respondents herein, by their answer and various motions, have lodged a broadside attack on the petition. Before any discovery or evidentiary hearings were conducted in the matter, the respondents simultaneously filed two motions--a motion for summary judgment and a motion to require the petitioner to plead each and every ground that could be asserted to attack his conviction and sentence. We address the latter motion first.

The latter motion obviously had its genesis in the United States Supreme Court decision cf Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983), and an order entered by the United States District Court for the Southern District of Alabama in the habeas proceedings attacking Alabama's death sentence of John Lewis Evans, III. The district court's order in Evans required Evans' counsel to do exactly what the respondents seek by way of their motion. The penalty suggested for failure to comply was a presumption that the petitioner had waived the merits of any claims not so identified in any future proceedings. The Barefoot decision dealt, in the main, with an abuse of the writ situation. Specifically, the court in Barefoot recognized the potential disruptive nature of successive petitions and gave its approval of procedures allowing for the expedited consideration of second or

successive petitions in cases where the death penalty has been imposed as punishment. Id. at ___, 103 S.Ct. at 3395.

As commendable and prudential as the district court's order appears, we think the more correct approach, and one supported by both the Barefoot decision and Rule 9(b) of the rules governing these type proceedings, is to deal with the issue if a second or successive petition is filed. To rule otherwise would seem to suggest that the court assumes the initial petition to be meritless. If the writ is eventually issued, the relief requested would not only be premature but unnecessary. But see Autry v. Estelle, 719 F.2d 1251, 1252 (5th Cir. 1983).

Turning next to the respondents' motion for summary judgment, we note that we implicitly overruled that motion by entry of our order allowing discovery and a hearing on

the petitioner's claims relating to his mental competency at the time of trial and at present (Claims VI A, B, C), and the claims relating to the alleged ineffective assistance of counsel (Claim VI J). Further implicit in this order is our rejection of the respondents' assertion that certain of the petitioner's claims are insulated from federal habeas review under either the doctrine of "independent and adequate state grounds" applied in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), or the "presumption of correctness" doctrine embodied in 28 U.S.C. §2254(d). In the following discussions of the merits of the petitioner's claim, we will more fully discuss the deference, if any, to be accorded factual findings, if any, made by the state courts; for now, we make more explicit our view of the respondents' "procedural bar" argument.

To be sure, notions of federalism and comity have led to the recognition "that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring [a federal district court's] review of a federal question."Hathorn v. Lovorn, 457 U.S. 255, 262 (1982); accord. Wainwright v. Sykes, 433 U.S. at 87-90, 97 S.Ct. at 2506-08. However, whether referred to as a corrolary or an exception to the doctrine, where the state court has reached the merits of a claim, a federal court is not barred under the doctrine. In such cases, there is simply no independent and adequate state ground and "a federal court implies no disrespect for the state by entertaining the claim." County Court of Ulster County v. Allen, 442 U.S. 140, 154; 99 S.Ct. 2213, 2223;60 L.Ed.2d 777 (1979). See e.g., Bell v. Watkins, 692 F.2d 999, 1004 (5th Cir. 1982); Henry v. Wainwright, 686 F.2d 311,

313-314 (5th Cir. 1982), judgment vacated on other grounds, 103 S.Ct. 3566 (1983); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981). Thus, there is no barrier preventing our reaching the merits of the petitioner's federal claims relating to his competency, the effective assistance of his counsel, the admission of various pretrial statements at his murder trial, the doubt jeopardy claim, and the claim of improper jury instructions at the two phases of the trial. The Mississippi Supreme Court addressed the merits of each of those claims on direct appeal. Any argument that the Mississippi Supreme Court's reference, in their opinion denying the petitioner leave to file a writ of error coram nobis, to those claims being procedurally barred from relitigation as translating into a foreclosure from litigation of the merits of those claims in this court is

simply preposterous. In refusing to reconsider those claims, the Mississippi Supreme Court was merely applying a rule of substantive law similar to res judicata but not comparable to the contemporaneous objection rule deferred to in the Sykes case. Cf. Edwards v. Thigpen, 433 So.2d 906, 909 (Miss. 1983) (Robertson, J., specially concurring). Thus, those claims that were addressed on the merits by the Mississippi Supreme Court on direct appeal are fully exhausted and not procedurally barred from our review.

Turning next to those claims in the petition that were raised for the first time in the state courts in the petitioner's writ of error coram nobis petition, we have a more novel question; that is, did the Mississippi Supreme Court's refusal to entertain claims raised for the first time in the petition for post-conviction relief represent such a radical change in prior practice as to not be entitled

to the characterization of "independent and adequate state ground." Recently, this precise issue has been addressed by two other United States district judges in the habeas proceedings of two other Mississippi death row inmates. Both judges, in well reasoned and supported opinions, concluded that the respondents' procedural bar argument, identical to the one here, was meritless. See Pruett v. Thigpen, No. EC 84-31-LS-D (N.D. Miss., Nov. 21, 1984); Edwards v. Thigpen, 595 F.Supp. 1271 (S.D. Miss., 1984). Both decisions can be read as rejecting the respondents' procedural bar argument either because (1) the rule was not in force at the time of direct appeal, see Granviel v. Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied. 455 U.S. 1003 (1982) (contemporaneous objection rule that did not exist at time of trial not enforced), or (2) the procedural rule was not "strictly or regularly followed," Hathorn, 457 U.S at 262 (quoting Barr v. City of Columbia, 378 U.S.

146, 149, 84 S.Ct. 1734, 1736, 12 L.Ed.2d 766 (1964)). However characterized, the result is the same--the state rule is not entitled to respect as an independent and adequate state ground.

We are inclined to analogize this case with the situation the United States Supreme Court faced in Hathorn. In that case, the Supreme Court had to consider, inter alia, whether the Mississippi Supreme Court had pretermitted consideration of a federal constitutional issue raised for the first time in a petition for rehearing before that court on the basis of a procedural rule which barred consideration of issues raised for the first time on rehearing. Stressing that an inconsistently or irregularly applied procedural rule is not adequate to bar federal review of the merits of an issue, the Supreme Court cited on Mississippi Supreme Court decision allowing the consideration of an issue raised for the first time on rehearing as demonstrable evidence that the Mississippi

Supreme Court did not consistently apply the rule, thus allowing a resolution on the merits. Id. at 264-65.

Similarly, in the present case, the respondents assert that when the Mississippi Supreme Court applied a procedural bar to claims Wheat raised for the first time in his petition for writ of error coram nobis, they were merely consistently following a regular practice. However, Mississippi decisional law belies this assertion. In Culberson v. State, 412 So.2d 1184 (Miss. 1982), the Mississippi Supreme Court reconsidered a claim of ineffective assistance of counsel that had been raised on direct appeal. Although the court was applying an intervening United States Supreme Court decision that impacted on their previous decision, it further stated, "[W]e have considered the other grounds of the writ of error coram nobis" and concluded they had no merit. Id. at 1187. No mention was made of any procedural rule. This decision was

rendered on April 21, 1982, a date subsequent to the filing of Wheat's original appeal. Moreover, the Mississippi Supreme Court made no mention of a procedural rule in denying the second petition for writ of error coram nobis filed by a death row inmate, Jimmy Lee Gray. This denial, entered some two months after the State Supreme Court's application of a procedural bar as to portions of Kenneth Wheat's petition, was interpreted by the Fifth Circuit as a ruling on the merits of the claim and thus rejected the state's argument that the federal court was barred from reviewing the claim presented. See Gray v. Lucas, 710 F.2d 1049, 1052, n. 2. See also Bell v. Watkins, 381 So.2d 119, 119 (Miss. 1980) (merits of a petition for writ of error coram nobis in a capital case considered with no mention of any procedural bar); Jordan v. State, 390 So.2d 584 (Miss. 1980) (same).

Our research reveals that the first explicit reference by the Mississippi Supreme Court to a procedural bar on error coram nobis to matters not assigned on direct appeal is in

the court's decision denying post-conviction relief for this petitioner. See Wheat, 431 So.2d at 488. Thereafter, in sharply divided opinions, the Mississippi Supreme Court clearly announced its intention not to consider matters raised for the first time on petitions for post-conviction relief. See Johnson v. State, 449 So.2d 1207 (Miss. 1984); King v. Thigpen, 441 So.2d 1365 (Miss. 1983); In Re Evans, 441 So.2d 520 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983).

We think it clear that a procedural rule applied in the petitioner's case, but neither alluded to nor relied on in similar cases decided before, during and after the petitioner's state court proceedings cannot be deemed an adequate state ground under either the Sykes or Hathorn decision.

II.

During the pendency of the proceedings in this court, certain claims of the petitioner

have been rendered meritless by decisions of the United States Supreme Court. We address those claims first.

A.

Under Claim K, the petitioner asserts that his federal constitutional rights were denied by the appellate court's failure to conduct an adequate proportionality review of his death sentence. This claim was necessarily premised on the theory that state appellate courts were constitutionally required to perform some type of comparative proportionality review in capital cases. Pulley v. Harris, ___U.S.___, 104 S.Ct. 871 (1984), dealt the final blow to this theory. Pulley rejected any notion that the Constitution "requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases. . ." Id. at _____, 104 S.Ct. at 876. The Court recognized that the states were free to undertake such a proportionality review if they

wished but emphasized that such was not constitutionally indispensable. Id. at ____, 104 S.Ct. at 876-879. In light of the Pulley decision, we fail to see any constitutional claim. In any event, the petitioner's argument that the Mississippi Supreme Court, having chosen to conduct a proportionality review, had to compare the petitioner's case with all other cases in which the death penalty could have been sought but was not, or the death penalty was sought but was not imposed, was rejected by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 258-59 & n. 16, 96 S.Ct. 2960, 2969-70 & n.16, 49 L.ed.2d 913 (1976). See also Gray v. Lucas, 677 F.2d 1086, 1111 (1982), reh'g denied, 685 F.2d 139 (1982) (where the Fifth Circuit rejected the identical argument made here).

B.

Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, ____ L.Ed.2d ____ (1983), and Zant v. Stephens, __U.S.__, 103 S.Ct. 2733, L.Ed.2d ___ (1983), definitively dispose of petitioner's Claim G. Under this claim, the petitioner argues that the sentencing instructions to the jury failed to provide the jury with any guidance as to the meaning of the term "especially heinous, atrocious or cruel manner," thus failing to channel the sentencers' discretion.[2]

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[2] The complained of instruction is numbered S-1 and appears in the record at page 873. It states:

> You have found the Defendant guilty of the crime of capital murder; you must now decide whether the Defendant will be sentenced to death or to life imprisonment; in reaching your decision, you must objectively consider the determining circumstances of the offense for which the defendant was convicted, and the character and record of the defendant himself.

(Footnote 2 Continued)

> To return the death penalty, you must find that any aggravating circumstance--those which tend to warrant the death penalty--outweigh the mitigating circumstance--those which warrant less severe penalty.
>
> Consider only the following elements of aggravating circumstances in determining whether the death penalty should be imposed:
>
> (1) Whether or not the capital murder was committed while the defendant, Kenneth William Wheat, was engaged in the commission of the crime of Robbery.
> (continued)
>
> (2) Whether or not the Defendant, Kenneth William Wheat, committed the capital murder in an especially heinous, atrocious, or cruel manner.

(Footnote 2 Continued)

(3) Whether or not the Defendant, Kenneth William Wheat, was previously convicted of a felony involving the use of or threat of violence to the person.

You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of these elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a separate sheet of paper:

> "We, the Jury, find that the Defendant should be sentenced to life imprisonment."

If one or more of these elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s). Consider the following elements of

(Footnoce 2 Continued)

mitigation in determining whether the death penalty should be imposed:

(1) The defendant's age at the time of the capital murder.

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(3) Any other matter, any other aspect of the defendant's character and record, an any other circumstances of the offense brought before your during the trial of this cause, which you, the jury, determine to be mitigating on behalf of the defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exists, then you must consider whether it (or they) outweigh(s) or

(Footnote 2 Continued)

> overcomes the aggravating circumstance(s) you previously found, and you must return one of the following verdicts.
>
> The verdict you return must be written on a separate sheet of paper in one of the following forms:
>
> (1) "We, the Jury, unanimously find that the aggravating circumstance(s) of: (here list or describe all of the aggravating circumstance(s) presented in this instruction for your consideration which you unanimously agree exist in this case beyond a reasonable doubt.)
>
> _____
>
> _____
>
> _____

(Footnote 2 Continued)

is/are sufficient to impose the death penalty and that there are sufficient mitigating circumstance(s) to outweigh the aggravating circumstance(s), and we unanimously find that the defendant should suffer death."

Foreman of the Jury

(2) "We, the Jury, find that the defendant should be sentenced to life imprisonment."

(3) "We, the Jury, find that we are unable to agree unanimously on punishment."

Putting aside for the moment the fact that this precise claim has been rejected by the Fifth Circuit, Gray, 677 F.2d at 1105, 1110; 685 F.2d at 141, we deny the claim for the more fundamental principles outlined in Zant and Barclay.

The Mississippi Legislature has determined not to define capital murder in terms of its atrocity, see MISS. CODE ANN. §97-3-19(2); however, it has chosen to statutorily permit a jury considering the imposition of the death penalty to take into account heinousness, atrociousness or cruelty to the victim as an aggravating circumstance to be weighed against mitigating circumstances. See MISS. CODE ANN. §99-19-101(5)(h) (Cum. Supp. 1984).

The jury returned a written verdict specifically finding that all three elements of aggravation were proven. See record at 890. The instruction as given appears at R. Supp. 194-198; there are no substantive differences in wording. What Zant and Barclay teach is that "statutory aggravating circumstances play

a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." Zant, ___U.S. at ____, 103 S.Ct. at 2743 (footnote omitted); Barclay, 103 S.Ct. 3424-28. Moreover, "the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances...." Zant, 103 S.Ct. at 2750.

In Zant, the jury, in imposing a death penalty, relied on an aggravating circumstance subsequently rendered invalid by the Georgia Supreme Court. In holding that such reliance did not render Stephens' death sentence unconstitutional, the Court focused on Georgia's statutory scheme and found that it

"provides for categorical narrowing at the definition stage and for individualized determination and appellate review at the selection stage." Zant, 103 S.Ct. at 2744. Thus, since the jury also found two valid aggravating circumstances, the "narrowing function" was fulfilled and the jury was free to consider at the selection stage any matter not erroneous or misleading provided it related to the character of the defendant or the circumstances of the crime. Id.

Zant left open the question of the "possible significance of a holding that a particular aggravating circumstance is "invalid"under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty. Id. at 103 S.Ct. 2750. This question was answered in Barclay. Under Florida's statutory death penalty scheme, the trial judge and not the

jury imposes the sentence. The trial judge is directed to weigh the statutory aggravating and mitigating circumstances in an almost identical fashion as the jury in Wheat's case was instructed to do. Relying on Zant, the Court let stand Barclay death penalty even though the sentencing judge considered an aggravating circumstance that was improper under state law. 103 S.Ct. at 3427. Again, the court focused on the function of the finding of aggravating circumstances under Florida law and the procedural protection afforded by Florida's mandatory appellate review of each death sentence. Id., 103 S.Ct. 3425-28.

Like Florida's statutory scheme, Mississippi requires sentencing juries to make specific written findings with respect to the existence of statutory aggravating circumstances and the sufficiency of any mitigating circumstances to outweigh the aggravating circumstances. See MISS. CODE ANN. §99-19-103 (Cum. Supp. 1984). Like

Florida and Georgia, at least one of the statutory aggravating circumstances enumerated in §99-19-101 must be found before the death penalty may be imposed. Thus, the function of statutory aggravating circumstances in Mississippi is to define that class of capital murderers that may receive the death penalty. Finally, under MISS. CODE ANN. §99-19-105 (3)(b) (Cum. Supp. 1984), the Mississippi Supreme Court is legislatively mandated to determine whether the evidence supports the jury's finding of a statutory aggravating circumstance. Patterned thusly, Mississippi has erected certain procedural safeguards to minimize the risk that the death penalty might be arbitrarily imposed. In the present case, the jury made written findings that at least two other valid statutory aggravating circumstances were proven and the petitioner does not attack these findings. Additionally, the state courts conducted an independent review of the record to ensure that at least

one statutory aggravating circumstance was present. Wheat, 420 So.2d at 241. No federal constitutional error resulted from the failure of the trial court to instruct the jury as to the specific meaning of the phrase "especially heinous, atrocious or cruel manner."[3]

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[3] There are some apparent limitations to the Zant-Barclay principles. A death sentence may not rest solely on a non-statutory aggravating factor, Barclay, 103 S.Ct. at 3433 (Powell, J., concurring) (citing Zant v. Stephens); nor may the sentencing authority rely on conduct protected by the First Amendment or by any other provision of the Constitution as an aggravating circumstance, Zant, 103 S.Ct. at 2746; Barclay, 103 S.Ct. at 3427. Aggravating circumstances that fail to narrow the class of persons eligible for the death penalty continue to be constitutionally impermissible under the plurality decision of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). The present case does not fit within any of the limitations.

III.

We next deal with the petitioner's other claims regarding improper instructions.

A.

The petitioner's claim that the weighing procedure at the sentencing hearing failed to require the state to prove beyond a reasonable doubt that the aggravating circumstances outweighed any mitigating circumstances impermissibly shifted the burden of proof to the petitioner is meritless. Not only was this issue decided adversely to the petitioner in Gray, 685 F.2d at 140-41, the argument is contrary to the rationale underlying the Zant and Barclay decisions. If the Constitution does not require specific standards to guide a sentencer's discretion in the selection stage, little protection would be added by requiring it to be instructed as argued here.

B.

Petitioner also complains that the trial court never adequately defined for the jury

what a mitigating circumstance was. Aside from the fact that the petitioner has cited absolutely no authority for this proposition, it is foreclosed because "the Constitution does not require a state to adopt specific standards for instructing the jury in its consideration of . . . mitigating circumstances . . . ." Zant, 103 S.Ct. at 2750. We feel certain that the jury understood the meaning of the term mitigating circumstance.

C.

Finally, the petitioner claims that the sentencing instructions failed to adequately inform the jury of its option to recommend a life sentence regardless of the existence or nonexistence of aggravating and mitigating circumstances. The issue is not whether a Mississippi sentencing jury has the option to sentence a capital murderer to life imprisonment, even in the absence of mitigating circumstances or a finding that the aggravating circumstances outweigh any mitigating

circumstances, for the law is clear that it does. See Gray, 677 F.2d at 1106 (citing Coleman v. State, 378 So.2d 640, 647 (Miss. 1979)). The issue in a federal collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction [or sentence] violates due process." Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of the state court judgment is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203, 212 (1977) (footnote omitted). Accord: Tarpley v. Estelle, 703 F.2d 157, 159 (5th Cir. 1983); Baldwin v. Blackburn, 653 F.2d 942, 951 (5th

Cir. 1981), cert. denied, 456 U.S. 950 (1982). Moreover, where the claim is based on "an omission, or an incomplete instruction [it] is less likely to be prejudicial than a misstatement of the law." Henderson, 431 U.S. at 154, 155, 97 S.Ct. at 1737.[4]

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[4] Trial counsel made no objection at the trial level to the sentencing instruction. However, we address the merits of the petitioner's sentencing instruction claims because the Mississippi Supreme Court on direct appeal stated that it had carefully considered the entire record in the cause and that "they clearly reveal that the jury was fully and adequately instructed before considering either the guilt phase or the penalty phase of the bifurcated trial." Wheat, 420 So. 2d at 240. As noted earlier, where the state courts have not followed the procedural rule, we are not barred from reviewing the claim.

Under these standards, and after review of the sentencing instruction at issue, we reject the petitioner's claim. The instruction clearly informed the jury that it could consider mitigating circumstances and, in our opinion, adequately informed them of their option to impose a life sentence, notwithstanding the finding of a statutory aggravating circumstance. Thus, this case is distinguishable from the holdings in Goodwin v. Balkcom, 684 F.2d 784, 794 (11th Cir. 1982), and Spivey v. Zant, 661 F.2d 464b (5th Cir. 1981), cert. denied, 102 S.Ct. 3495 (1982); therefore, any rights the petitioner has under Lockett v. Ohio, 438 U.S. 586, 98 S.ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), were were protected. Nothing in the instruction precluded the jury from considering individualized and mitigating factors. Although the instructions are not quite as explicit on the option to recommend against death, we feel that the Zant and Barclay

decisions foreclose any finding of constitutional error because, as noted earlier, the Court stated that nothing in the Constitution required such specific instructions at the sentencing phase.

D.

We turn next to the petitioner's claim that the failure of the trial court to given an instruction on the lesser included offense of simple murder at the guilt phase violated the holding of Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). We hold that Beck was not violated. Beck does not stand for the proposition that a state habeas petitioner is constitutionally entitled to a lesser included offense automatically; it merely reaffirmed that it was "beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him

of the greater." Beck, 447 U.S. at 635, 100 S.Ct. at ___ (quoting Keeble v. United States, 412 U.S. 205, 208). "Beck imposed no due process duty to instruct on a lesser offense." Jones v. Thigpen, 741 F.2d 805, 816 (5th Cir. 1984). The constitutional offense in Beck was Alabama's absolute prohibition or preclusion of the granting of a lesser included offense instruction in a capital murder trial. The Supreme Court noted that this was a unique proposition in American criminal law and that only one other state, Mississippi, had incorporated such a prohibition. The Court further noted that the Mississippi Supreme Court struck down the prohibition in Jackson v. State, 337 So.2d 1242, 1255 (Miss. 1976). But the law demands the granting of a lesser included offense instruction only if such is "warranted by the evidence." Beck, 447 U.S. at 625, n. 10. Compare Fairchild v. State, ____ So.2d____(Miss. 1985) (adopting the rational juror test of Beck in deciding whether the

refusal to grant a lesser included instruction was proper).

In light of the standard of review in this matter, as set out above, and after review of the evidence adduced at trial, we find that no rational juror could have acquitted Wheat of robbery, thus acquitting him of capital murder. See Jones v. Thigpen, 741 F.2d at 816; Bell v. Watkins, 692 F.2d at 1004-1005 (noting that no murder committed during the course of a robbery in Mississippi can be simple murder).

IV.

CLAIM D -- ADMISSION OF WRITTEN STATEMENTS

While in custody but prior to his trial, Wheat penned two notes which he gave to jail officials. In one note, he expressed a desire to plead guilty to the murder charges and in the other note, written the same day, Wheat explained that even though he was innocent of the murders, he wished to plead guilty to spare himself and his family any suffering. The statements were admitted into evidence at the petitioner's trial, over objection, and

appear at R-712 and 718, respectively. This claim was raised as error on direct appeal and the Mississippi Supreme Court found no error. Wheat, 420 So.2d at 239.

Inasmuch as the state courts made factual findings in ruling on the motions to suppress these notes, they are presumptively correct. 28 U.S.C. §2254(d); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Brantley v. McKaskle, 722 F.2d 187 (5th Cir. 1983). These findings include the awareness of the defendant of his Fifth Amendment rights and the absence of any coercion, threats or intimidation. See Wheat, 420 So.2d at 240.

The petitioner contends, however, that his alleged incompetency at the time of trial prevented these statements from being the product of a rational intellect and free will. He, therefore, relies on Blackburn v. Alabama, 361 U.S. 199, 208 (1960), to support his claim. Blackburn's holding is clear: The confession of a defendant that is probably

incompetent and insane is inadmissible against him. Id.

The petitioner assumes that the notes in question are confessions, but a reading of the notes suggests otherwise. Rather than being confessions, one note merely states a desire to plead and the other note explains that desire; the final note professes innocence and is exculpatory in nature. Thus, even if Wheat were deemed incompetent, we seriously question whether the Blackburn holding would apply. We fail to see the claimed constitutional error.

V.

CLOSING ARGUMENT -- GUILT PHASE

The petitioner contends that the prosecutor's closing argument at this stage of the trial so inflamed the prejudices of the jury that it denied him a fundamentally fair trial. This Court has carefully read closing arguments of both sides (R.II 162-193), and as required by the case law, we have considered

the arguments in the context of the entire trial to determine whether the argument was a crucial, critical, highly significant factor in the jury's determination of guilt. See e.g., Whittington v. Estelle, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 104 S.Ct. 428 (1983). In our review, we do not sit as a "super state supreme court," id.; our standard is simply whether the argument rendered the trial fundamentally unfair under contemporary notions of due process. Donnely v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974).

While we agree that some of the prosecutor's statements were improper, particularly the ones suggesting to the jury that they convict the defendant in order to send a message that the Mississippi Gulf Coast was safe, we cannot say that any argument, improper or otherwise, was a crucial and significant event in the determination of the

defendant's guilt. Substantial evidence, circumstantial and direct, was adduced at trial indicating that the defendant did indeed commit the crimes. Compare Matheson v. King, 751 F.2d 1432 (5th Cir. 1985), with Menzies v. Procunier, 743, F.2d 281 (5th Cir. 1984).

VI.

CLAIM J -- INEFFECTIVE ASSISTANCE OF COUNSEL

A.

The petitioner claims that he was denied effective assistance of counsel at both phases of his bifurcated trial. Specific examples of ineffectiveness include: (1) failure to move for consolidation of the two charges pending against the petitioner, (2) failure to adequately conduct an investigation into the petitioner's mental state, (3) failure to investigate and present evidence with respect to mens culpa, (4) failure to adequately investigate and present evidence with respect to petitioner's mental state as being grounds

for mitigation of sentence, (5) failure to secure the appointment of an independent expert to investigate petitioner's mental state, (6) failure to timely object to and assert as error on appeal the grounds set forth in the petition as Claims A-H, and (7) failure to ensure that a complete transcript was prepared for appeal.

Such claims sound a recurrent theme with which this Court is familiar. They have as their genesis the recognition that "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970). A wealth of Fifth Circuit case law has defined the parameters of the right and what must be shown to constitute a violation thereof. However, only recently the United States Supreme Court for the first time articulated the standard to be applied in addressing a claim of "actual ineffectiveness." See Strickland v. Washington, _____U.S. _____, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). Not only did the Court in Strickland articulate the

constitutional standard, it made clear that counsel's duties do not reach a higher plane because the defendant's life is at stake. Id. at _____, 104 S.Ct. at 2064. Though cautioning that the principles enunciated were not to be given mechanical application, the Court established a two-pronged test for determining these claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

Id. at _____, 104 S.Ct. at 2064.

The Court recognized that the proper standard for attorney performance was that of reasonably effective assistance. Id. However, "[j]udicial scrutiny of counsel's performance must be highly deferential, id. at _____, 104 S.Ct. at 2065, and "a court must indulge a presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 104 S.Ct. at 2066 (citation omitted). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." Id. But such claims "are subject to a general requirement that the defendant affirmatively prove prejudice . . . [and] the defendant must show that [the errors] actually had an adverse effect on the defense."

104 S.Ct. at 2067. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at _____, 104 S.Ct. at 2069. Therefore, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence-- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at _____, 104 S.Ct. at 2069.

Since a defendant or habeas petitioner shoulders the burden on both prongs of the inquiry, we "need not determine whether counsel's performance was deficient before examining the prejudice counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Thus, the Supreme Court suggested that if "[i]it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 104 S.Ct. at 2070. We choose to follow this suggestion.[5]

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5 We note that the Supreme Court was concerned that the availability of intrusive post-trial inquiries into an attorney's performance would encourage the proliferation of ineffectiveness challenges. 104 S.Ct. at 2065. Given the Court's suggestion of an initial prejudice analysis and the premises undergirding the Court's refusal to adopt specific standards governing attorney performance, we may not have

(Footnote 5 Continued)

allowed the petitioner discovery or a hearing on his claim. The evidence adduced at such a hearing is largely irrelevant to the prejudice inquiry. See 104 S.Ct. at 2068.

Were we to intimate an opinion as to counsel's performance, it would simply be that the petitioner herein has failed to satisfy that component of the Strickland test. The petitioner's trial attorneys were experienced in the area of criminal law and had, in fact, tried at least four capital murder cases. In explaining why they did not pursue in any manner the presentation of psychiatric evidence, the attorneys apparently made a tactical decision that since the jury in the first case had returned a life sentence, they could not argue with the petitioner's demand that they not present such testimony at either phase of the trial.

Petitioner's present counsel were afforded ample notice both prior to and during the last hearing held by this Court that they were being given the opportunity to offer evidence on the ineffectiveness claim. None was. With the strong presumptions of Strickland in front of them, it might even be suggested that the petitioner has abandoned this claim.

B.

Even assuming that the specified failure were unreasonable, we conclude that the defendant has failed to affirmatively show that there is a reasonable probability that the fact finder would have had a reasonable doubt respecting guilt or that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this conclusion, we have considered the totality of the evidence before the jury at both the guilt and penalty phase of the trial, and we have "presumed . . . that the judge or jury acted according to the law." . . .and "that the decision maker . . . reasonably, conscientiously and impartially appli[ed] the standards that govern the decision." 104 S.Ct. at 2069.

As noted earlier, the evidence at the guilt phase of the trial was more than

substantial in pointing the finger at the petitioner. We doubt seriously whether any of the alleged errors would have affected their decision. However, that is not our inquiry; rather, we are to determine whether the alleged errors undermine our confidence in the outcome. They do not.

The jury in its written findings at the end of the penalty phase determined that the state had proven beyond a reasonable doubt the existence of three aggravating circumstances: (1) the murder was committed during the commission of a felony, robbery; (2) the crime was committed in an especially heinous, atrocious and cruel manner, i.e., tying the victim's hands behind his back and shooting him in the head, and (3) the prior criminal record of the defendant. Although the jury was not required to make written findings of the mitigating circumstances it considered, as we

must presume, those given to them; by the court. Those included the defendant's age, the ability of the defendant to appreciate the criminality of his conduct, and any other matter or aspect of the defendant's character or record or any other circumstance of the offense which they determined to be mitigating, warranting a penalty less severe than death.

As was the case in Mattheson v. King, 751 F.2d 1432 (5th Cir. 1985), Wheat has failed to present or describe the testimony of any witness that would show that trial counsels' failure to introduce psychiatric testimony in mitigation would have had a significant impact on the jury's decision. As Mattheson indicates, such psychiatric testimony may not have been regarded as a mitigating factor by the jury. Id. at 1440.

C.

Paragraph 67 of the petitioner's complaint can be interpreted as raising the issue of

effective assistance of counsel on appeal. The allegations contained therein are conclusory and totally unsupported by any evidence adduced in this Court. The record of proceedings in the state court, however, reveals the following. Initially, Wheat's trial attorneys, Stegall and Hester, represented him on his direct appeal to the Mississippi Supreme Court. An appellant's brief was filed, assigning as error essentially the same claims alleged as the first five grounds of the instant petition. While the appellant's brief was perhaps not as thorough as the briefs presented to this Court, it sufficiently raised the issues before the Mississippi Supreme Court and ensured that this Court would be able to reach the merits thereof. But, in a rather unusual set of events, Wheat, through bizarre correspondence to the Court and his attorneys, was effectively without any counsel after the

filing of the appellant brief. First, Wheat fired Stegall, who obtained permission from the Court to withdraw; then Wheat hired and fired Cleve McDowell before McDowell filed a reply brief on the petitioner's behalf. The Mississippi Supreme Court also allowed McDowell to withdraw and the only legal work McDowell performed for Wheat was the filing of an opposition to the motion of the state to deny the petitioner in forma pauperis status. In addition to no reply brief being filed, no one appeared on the petitioner's behalf at oral argument and, consequently, the Mississippi Supreme Court heard no oral argument.

In rejecting this portion of the ineffectiveness, we emphasize that the petitioner has failed to adequately support the allegations or demonstrate the prejudice flowing therefrom. We have addresses this issue primarily because only recently has the

United States Supreme Court held that the due process clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. See Evitts v. Lucey, _____U.S._____, 105 S.Ct. 830 (1985). In Evitts, the defendant's counsel failed to obey a simple court rule that resulted in the preclusion of state appellate review of his conviction. However, since there was no challenge to the district court finding that the defendant received ineffective assistance of counsel on appeal, the Court pretermitted any decision on the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Id. at _____, 105 S.Ct. at 833. But see Jones v. Barnes, 463 U.S. 745 (1983) (attorney need not advance every argument, regardless of merit); Swenson v. Bosler, 386 U.S. 738 (1967) (both holding that

appellate counsel must be available to assist in the preparation and submission of briefs). The failure of the Supreme Court to enunciate appropriate standards is not critical to the result here; the petitioner's failure to show any prejudice yields the same result under any standard.

VIII.

MENTAL COMPETENCY

By previous bench opinion, after an evidentiary hearing, this Court ruled that the objective facts known to the state trial court were sufficient to raise a bona fide doubt as to the competence of the petitioner to stand trial, and the failure of the trial court to make further inquiry into the petitioner's competency denied him procedural due process rights under Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966). See also Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896,

43 L.Ed.2d 103 (1975); Lokos v. Capps, 625 F.2d 1258 (6th Cir. 1980); Martin v. Estelle, 546 F.2d 177 (5th Cir. 1977); Bruce v. Estelle, 483 F.2d 1031 (6th Cir. 1973); Lee v. Alabama, 386 F.2d 97 95th Cir. 1967).

The question then became whether this Court could conduct a hearing to determine retrospectively the petitioner's competency as of the time of his trial. The burden was on the respondents herein to convince this Court as to the meaningfulness of such a nunc pro tunc determination. Lokos, 625 F.2d at 1262. At the end of the evidentiary hearing, we rendered another bench opinion ;in which we concluded that there could indeed be a meaningful retrospective determination of the petitioner's competency. The burden then shifted back to the petitioner to prove by a preponderance of the evidence that he was in

fact incompetent at the time of his trial. Id.

To aid us in this determination, and at the request of the petitioner's counsel, we ordered the petitioner committed to the medical center for federal prisoners at Springfield, Missouri, for a ninety-day period of psychiatirc observation and evaluation and requested opinions on the petitioner's competency at the time of his trial in January, 1980, and his present competency.

In February, 1985, after the completion of the psychiatric evaluation, this Court conducted another evidentiary hearing to afford the petitioner the opportunity to prove that it was more likely than not that he was mentally incompetent at the time of his trial. At this hearing, the psychiatric and psychological evaluations and the reports generated by the

Springfield commitment were introduced into the record. Additionally, Dr. William Logan, the examining psychiatrist at Springfield, appointed as an expert witness under FRE 707, testified. Dr. Harold Kaufman, psychiatrist and lawyer, testified as an expert for the petitioner. Drs. Guild, Stanley and Whelan testified for the respondents. Testimony adduced at the previous evidentiary hearing, including that of the petitioner's trial counsel, the prosecuting attorney, and the state court trial judges, was, of course, also considered. On the basis of the entire record, we conclude that the petitioner has failed to meet his burden and find that he was legally competent at the time of his trial in January, 1980.

"The ultimate focus in a retrospective competency hearing must be whether at the time of trial the accused had sufficient ability to consult with his attorney with a reasonable degree of rational understanding and whether he

had a rational as well as factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)." Bruce, 536 F.2d at 1059. Moreover, it is often judicious for a district court to make a threshold inquiry into whether the petitioner suffers from a mental defect at all. Id. This is based on the logic that one who is not suffering from a mental disease can hardly be said to be incompetent. Id. at 1060. With this in mind, the court asked Dr. Logan the following:

> Q. Can you tell ;me whether, in your opinion, he suffered from mental defect, any be mental defect I mean an actual disease at the time of his trial in 1980, as distinguished from a personality disorder, or may we so distinguish it? That's a gray area for me and it may be for psychiatrists, I don't know.
>
> A. One of the things I think is lacking in these kinds of situations is some kind

of clear definition of what "legally" constitutes a disease or defect. Part of the difficulty with putting many psychiatric disorders in the disease or defect category is that the etiology of many psychiatric disorders is really not known, so we really dont' know what the cause of a certain group of behavior is. In schizophrenia, for example, we know that medication tends them by changing a balance of neurotransmitters in the brain. We know that given the same medication, a personality disorder tends to produce no effect. It is generally supposed that the early childhood experiences play a more predominate part in developing a personality disorder than anything internal, but there is a small minority of psychiatrists who believe that there are defects which cause some of these personality disorders as well, things like what they call "soft neurological signs." abnorman EEGs, lateral incordination, and perhaps an inherited personality characteristic, so the field itself has a divergency of opinion.

Q. What's your opinion?

A. My opinion is that, at least when one loks at criminal responsibility, one should take a strict, narrow interpretation of disease and effect, using "disease" to look at conditions which are called major psychiatric disorders, those such as schizophrenia,

> bipolar affective disorder, major depressions and use "defects" to describe things such as organic brain conditions, either caused by drugs or alcohol, pre-senile dementia, mental retardation, some kind of brain trauma.
>
> Personality disorders, however, in terms of competency often do affect somebody's ability to interact as effectively with their attorney and present an adequate defense and should probably be considered I think, in that context.

Earlier in his testimony, Dr. Logan testified that the petitioner was "mentally ill in the general sense of the word." We tend to agree, and suggest that it is immaterial for us to determine the precise nature of the petitioner's mental illness for "[o]nce it is established that an individual suffers from a clinically recognized disorder, the court must decide whether such condition rendered the accused incompetent under the Dusky formulation." Bruce, 536 F.2d at 1059. With

this premise, it is academic how this Court resolves conflicting evidence regarding the exact diagnosis of the petitioner's mental disability. Dr. Logan, joined in by Drs. Echols, Guild, Whelan and Stanley, diagnosed the petitioner as suffering from a mixed personality disorder with paranoid, narcissistic and antisocial features. Dr. Harold Kaufman, called by the petitioner, Wheat, concluded that the petitioner suffered from schizophrenia, paranoid type. At the very least, Mr. Wheat suffers from a paranoid personality disorder and such a disorder may render one incapable of making rational decisions. Moreover, it is clinically recognized by the psychiatric profession as a disorder. See Diagnostic and Statistical Manua, 3rd Ed., at p.363. Thus, this case is unlike the cases of Lokos and Bruce where the competing expert diagnoses were schizophrenia

or sociopathic personality, the latter condition unrecognized clinically as capable of rendering the sociopath legally incompetent. See id. However, out of an abundance of caution, this Court will briefly sketch the salient personal and medical history.

The first record of any mental problem suffered by the petitioner is his discharge from the Army in May, 1957, suffering from "acute psychotic regression with classic symptoms of schizophrenia with delusional and hallucinatory phenomena." Three years later, he was recommended for psychiatric treatment after being convicted of attempted suicide. Then, in April, 1962, he was committed to the New Jersey state prison system to commence serving a five to twenty-year term of imprisonment as a result of his plea of guilty to the second degree murder of his brother-in-law. Over the course of the next

seventeen years until his release around March, 1979, he was diagnosed and treated as a schizophrenic. He received antipsychotic drugs and electroshock therapy. During this time, the petitioner attracted the attention of the FBI by sending threatening letters to the President and other government officials. Reports of a "delusional system" were observed beginning in 1975. In 1978, it was indicated that the petitioner had a delusional system which included both the FBI and the CIA. Also, from 1975 until his release, the petitioner refused to cooperate in examinations by psychiatrists. The last psychiatrist to examine the petitioner in March, 1979, shortly before his release from the New Jersey state prison system, recommended that the petitioner be committed to a psychiatric facility upon release because he was highly potentially dangerous to the community. Unfortunately,

this recommendation was not followed and, within a few months, Wheat committed the crime for which he is now under the penalty of death.

The petitioner apparently aimlessly drifted about the country during the few months after his release from prison but prior to the commission of the crimes. He visited the Gulf Coast region to see relatives and eventually was picked up on a shoplifting charge in Orlando, Florida, on October 17, 1979, some two and one-half months after the murders. While in custodyin Orlando, he made statements to journalists, reprinted in a newspaper story that was attached to the state's motion for competency examination, that he was set up murder charges by federal officials because he knew too much about the Kennedy assassination. He had also sent postcards to the mayor of Gulfport, Mississippi, stating that he knew the authorities were looking for him and that they should contact the FBI or CIA since they knew his whereabouts.

The petitioner was eventually extradited to Harrison County, Mississippi, to face the murder charges. As noted earlier, he wrote two rather bizarre notes prior to the first trial in which he indicated that although he was innocent of the Mayer murders, he wanted to plead guilty to spare himself and his family. He again mentioned the FBI's and CIA's alleged conspiracy to discredit him.

Prior to either trial, the petitioner's trial counsel filed a "motion for mental examination;" however, the trial judge allowed this motion to be withdrawn after petitioner's trial counsel advised the court that the petitioner would not voluntarily submit to such an examination. The trial judge inquired of the petitioner, in open court, whether he understood the request and after receiving an affirmative answer, allowed the withdrawal of the motion. Then, two days later, after the petitioner had authored the two notes previously discussed, the state, through its

district attorney, filed its own motion for mental examination. At the hearing on this motion, the following colloquy between the court and the petitioner took place:

Court: May I ask Mr. Wheat a question? Mr. Wheat, do you understand why it is you were brought back up here again today?

Wheat: Yes, sir. Do you want me to stand up?

Court: Of course, that being that the district attorney filed a motion to have you examined by a psychiatrist. My understanding is you previously, before Judge Grant, who had heard all the motions up to this point. I'm Judge Griffin. I'm the one who will be trying your case if we go to trial next week. It is my understanding that Mr. Stegall did file a motion to have you examined by a psychiatrist.

Wheat: I withdrew it.

Court: You wanted him to withdraw it. Is that correct? What is your attitude about the motion today?

Wheat: What?

Court: What is your attitude about the district attorney's motion? Is it the same?

Wheat: Well, I think I'm sane. I don't require a . . . .

Court: Just go ahead and explain it to me however you want to.

Wheat: If the court orders it, I'm going to refuse it. I'm ready to go to trial Monday.

Court: I You say that you would refuse it?

Wheat: Yes, sir.

Court: By that--of course, we could physically remove you to the psychiatrist's office. You understand that?

Wheat: I would remain silent.

Court: You would remain silent. Of course, I cannot make a man talk. I don't have that power; and without him talking, Mr. Necaise, I don't think it's . . . .

District Attorney Necaise: I'll ask the court to inquire any further if he has desires of having one, or if he resists . . . .

Court: If he says he is not going to talk to one, I think the answer to that question has already been made.

District Attorney Necaise: Could I ask the Judge to ask him that question for the purpose of the record?

Court: All right. Are you desirous of having an examination? I believe that was the question.

Wheat: I said if the court appoints--demands that I--I can't hear too good. I've got an ear infection in both ears. I can't hear myself talk. If the court orders the examination, I'm going to refuse to say anything to the psychiatrist. That's how it is.

Court: In other words, you don't want one?

Wheat: Right. That's a way of saying it.

. . . .

Court: Yes. And have you ever been treated by a psychiatrist, Mr.

. . . .

Wheat: Yes.

Court: Where was that, Mr. Wheat?

Wheat: Most people who go to prison for a long time require psychiatric help because prisons are snake pits are New Jersey. It's a big insane asylum, you know; and....

Mr. Stegal: Could I have the court's indulgence?

Wheat: . . . problems, you know? It includes the prison officials as well as the inmates.

. . . .

Wheat: Yes, sir. But I'm saying it's not uncommon for a prison or prisoner in Trento State Prison to be under psychiatric care. The majority of the inmates are. And a lot of times they may try to get themselves sent to the state hospital because it's a lot better place than Trenton Prison. You've got more privileges; so inmates try to play crazy to get sent there, not because they are crazy.

Court: I don't doubt that at all, and I feel a little sympathetic with them. Go ahead. Do you have anything else you want to tell me?

Wheat: I'm finished. I'll see you in trial Monday.

Court: All right, sir. Well, Mr. Necaise, I feel this way about it. I can't make a man talk to a psychiatrist; and Mr. Wheat has told me unequivocally-- Let me ask you one other thing. Did you ever get a report from any psychiatrist, Mr. Wheat? Never did receive one?

Wheat: They keep everything secret in prison.

Court: Nobody has ever advised you that you do need medical treatment?

Wheat: They say everybody in prison is crazy. All inmates are crazy. If they weren't crazy, they wouldn't be in prison. That's the way they think, you know. I don't think I need any treatment right now. I'm fully prepared to go to trial and communicate with my lawyer in every way.

Court: Well, of course, Judge Grant has already made a finding rather unequivocally that it didn't appear to him that the man needed any treatment. He hadn't indicated anything to me today that would cause me to think differently from what Judge Grant found. So, I find that the man is rational, able to communicate with his attorney, has expressed a desire to stand trial, and as far as his correspondence and things that he has done in the past, even in relation to this case, like statements made to the paper in Orlando, I'm not going to inquire into his motives in making those statements. I assume that he had it at least in his own mind, a good motive; and a motive not good; but that would probably be a mistake to state that; but a motive that was in his own best interest. I think he is able to form motives, intent, that would be in his own best interest. Is

that right, Mr. ? And whatever purpose he made that, I think he felt like it might be to serve him well to make those type of statements; and I think he is nodding that he did do that. So, I think it would be just a waste of time to have the man--try to attempt to have the man examined in light of his statements that he has made here today. We can't anticipate everything that is going to happen two years from now or a year from now in the state Supreme Court or some federal court on petition for writ of habeas corpus. I just can't anticipate all that. As far as I am concerned, the man is ready to go to trial, able to go to trial. There is no doubt in my mind about that. I deny the state's motion and send him back to the jail; and have everybody here at ten o'clock Monday morning. I've had the jury ordered to come in at nine thirty to get the little cards

> filled out, so everybody can get a better look at who's here and all that; I don't see the point any further on this. That's all. I don't like to disagree with the district attorney, but in this case, I do. I can't see there is any point in this. All right. Okay. You go back to jail.

Wheat faced trial first for the capital murder of the victim's bride, and the jury found the appellant guilty of capital murder on the morning of December 8, 1979. A third and final motion for mental examination was then filed by his attorney. At the hearing on this motion, the petitioner stated that he wanted an examination and the trial court aceeded but decided to go ahead with the sentencing phase of the trial on the premise that if the mental examination showed the petitioner to be incompetent, he would then set aside the sentence. The jury unanimously

returned a sentence of life imprisonment. The record also reflects that the petitioner was thereafter taken to see a psychiatrist, but he refused to submit to an examination.

Contemporaneous Observations

The petitioner's lead trial counsel, Earl Stegall, testified that Wheat talked extensively about a conspiracy he referred to as MK ULTRA invovling attempts by the CIA and FBI to silence or discredit him to the special knowledge he had of the John F. Kennedy assassination.[6] This was the only evidence of

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[6] The term MK ULTRA is not fictitious but is in fact a code name for a research project financed and overseen by the Central Intelligence Agency between 1953 and 1966. The project's goal was "to counter perceived Soviet and Chinese advances in brain-washing and interrogation techniques." Central Intelligence Agency v. Sims, ___ U.S. ____, ____, 53 U.S.L.W. 4453, 4454 (1985) (holding that the names of institutions and individuals participating in the project were exempt from provisions of the Freedom of Information Act.) Various aspects of the controversial project became public in the mid-1970s. Id.

any delusion on the part of the petitioner seen by his trial counsel. In the opinion of Stegall, who had prior experience in dealing with mentally ill and mentally incompetent defendants, the petitioner was competent and able to assist in his own defense.

This opinion was reinforced after the first trial and sentence of life imprisonment, according to Stegall. He testified that after the petitioner avoided the death sentence in the first trial, his spirits improved considerably. Wheat also "more or less" told Stegall, "I told you so," with reference to his having refused to undergo a mental examination. The relationship between attorney and client also showed marked improvement after the first trial. Wheat was not only able to but actually did assist and cooperate in his own defense. He suggested good voir dire questions and questions to ask witnesses and

even gave his attorneys the name of an alibi witness. His attorney felt that he definitely understood the charges against him and the fact that the death penalty could be imposed. The only area in which Stegall felt that Wheat was uncooperative was with respect to the use of psychiatric testimony in defense or mitigation. Stegall recalled that the petitioner did not suffer any auditory or visual hallucinations; he was coherent in speech and was well oriented as to time and place.

Petitioner's other trial counsel, John Hester, basically concurred in Stegall's observations and again noted that he observed no bizarre type behavior on the part of the petitioner, excepting his "belief" that he had information concerning the Kennedy assassination.

The district attorney who prosecuted Wheat also testified that he observed no irrational behavior on the part of the petitioner at any time during either of the two trials.

Nothing in the dispositions of the state court trial judges who presided over various proceedings involving the petitioner would detract from the above lay observations. Although none of the three judges were impressed by the petitioner's in-court responses. Circuit Judge Vlahos noted the petitioner's response with respect to a change of venue motion as impressive, given his non-legal background.

Springfield Report

Before reviewing Dr. Logan's testimony, it is wise to put it in proper perspective. Apparently, from the record, Dr. Logan's examination and evaluation was the first extensive psychiatric observation and

examination of the petitioner since his release from the New Jersey state prison system and the very first psychological testing of him ever conducted or a least recorded. It may well be the first time the petitioner has cooperated in such an examination since 1975 or 1977. Dr. Logan's evaluation included at least six hours of personal interviews with the petitioner and an obviously thorough examination of the entire medical records compiled while the petitioner was incarcerated in New Jersey. Dr. Logan also had the benefit of the trial transcripts, which reflected cogent but brief colloquies between the court and the petitioner, the transcripts of hearings held before this Court, including the testimony of the trial counsel and prosecutor and trial judges, and, perhaps most importantly, the results of Dr. Echols' psychological evaluations and psychological tests conducted

on the petitioner. This latter is highly significant in this Court's opinion because the experts considered the psychological tests an indispensable diagnostic tool to assist the medical community in differentiating between major psychiatric disorders and personality disorders. At least one expert, Dr. Guild, changed his diagnosis from paranoid schizophrenia to mixed personality disorder based on the psychological tests. Dr. Stanley's testimony was most illuminating in this respect.

Based on this extensive examination, Dr. Logan was of the opinion that in addition

to the petitioner's being "obviously competent at the present time."[7] Wheat was also competent at the time of trial. This opinion was echoed by Dr. Echols and all others except Dr. Kaufman, who, as will be seen later, actually agreed more than he disagreed with the conclusion.

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7 We accept this finding and thus summarily dispose of the Petitioner's Claim C that Mississippi law and the due process clause and Eighth Amendment of the United States Constitution preclude the execution of the presently insane. Wheat is not presently insane or incompetent although he continues to exhibit signs of personality disorders. See Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983) (Where mental illness; discussion, but no holding, on federal interest in execution of mentally incompetent and suggested standard).

In addition to being subject to pointed questions by the parties, this Court extensively questioned Dr. Logan. We briefly summarized his answers.

It is Dr. Logan's opinion that "way over fifty percent of the evidence" supports the fact what Wheat is competent at this time. He stated that neither during his own interviews nor those of Dr. Echols were any signs elicited of any delusional hallucinations which impacted on Wheat's current legal situation. In fact, Wheat stated with uncanny accuracy the prior history of his legal situation. Dr. Logan is of the opinion that in January, 1980, Wheat did not suffer from schizoprhrenia, he was not psychotic, and he did not suffer from the diagnostic entity called paranoia, although he was very suspicious and very distrustful of others. Dr. Logan opined, rather, that Wheat did suffer from personality disorders of three

kinds: (1) a paranoid personality disorder, (2) a narcissistic personality disorder, and (3) an antisocial personality disorder.

Dr. Logan explained that the paranoid personality disorder had the most impact on Wheat and is characterized by a person who is very suspicious and distrustful of people who are in authority. Such a disorder may have influenced Wheat to be unusually guarded about presenting psychiatric evidence and may have also led him not to present psychiatric evidence at the sentencing phase of the trial.

The narcissistic personality is evidenced by grandiose statements about Wheat's own importance, possibly explaining some of his statements about the FBI and the CIA, as well as some of the more bizarre elements that occurred prior to the first trial. This personality feature probably had little, if

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any, effect on Wheat's behavior in either trial.

The antisocial personality is characterized by a longstanding disrespect for the rules of authority and, very generally, a lack of conscience about what one does. This feature bears more on why Wheat performed the act that he was charged with having committed, rather than his actual behavior during the trial itself.

In sum, the most significant thing that impacted upon Wheat's behavior at the time of his trial was his suspiciousness and perhaps some despondency.

"The majority of the evidence" suggests that Wheat suffered no major psychiatric disorder in January, 1980. Facts that militate against such a finding are, in general, his attentiveness to the trial process, his ability to respond effectively to the questions about a

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change of venue, the fact that after several years, in the recalling of events of that trial, he was able to do so with unerring accuracy, including who the witnesses were, what their testimony was and what the basis of his defense was. Such attentiveness to details suggests that at least during the trial process Wheat's mental processes were not being interferred with by hallucinations, delusion, mind wandering over the courtroom or preoccupation with unusual thoughts. He was very focused on what he was doing in the courtroom.

The evidence does not suggest that the petitioner was suffering from any psychosis or loss of contact with reality during the time of trial. Although the evidence with respect to whether Wheat suffered from a delusional system was more tenuous than others, it is improbable that Wheat was suffering from a delusional

system. Overall, Wheat had a factual understanding of everything that was transpiring and appeared to have an ability to work with his attorney. His perception of the events was rational with the exception of the sentencing phase at the first trial. Dr. Logan does not believe that Wheat had a rational understanding of the likelihood that he could have received the death penalty and what the death penalty meant.

Although Dr. Logan was not sure whether the decisions made at the sentencing phase at the second trial were made any more competently than in the first, he recognized that the petitioner's success in avoiding the death penalty in the first trial may well have influenced his action in not seeking psychiatric evaluation or presenting psychiatric evidence in the second (the one in question here).

In support of his opinion that Wheat was not suffering from the diagnostic entity paranoia in January, 1980, Logan stated that this type disorder manifests itself in fixed delusional systems that do not change even with psychotrophic medication. Since prognosis in such cases is very bleak and since those suffering from it infrequently deny the delusional system, it would have been present at the time Logan examined Wheat, but was not.

In sum, Dr. Logan opined that Wheat acted fairly logically and rationally, with the exception of not presenting any psychiatric evidence at the sentencing phase. The doctor considered it illogical that Wheat focused on the short term gains of not being placed in a state mental hospital while ignoring the very real possibility that he could receive a death sentence; however, the doctor "left it to others as to whether this was rational."

Dr. Logan's responses were very cogent and his diagnoses supported by the record and testimony of others. In fact, the petitioner's sole expert, Dr. Harold Kaufman, agrees with most of Dr. Logan's ultimate conclusions.

Dr. Kaufman, who has never personally examined the petitioner, felt that the petitioner was obviously schizophrenic, exhibiting all the classic symptoms or characteristics of it, including loose association, ambivalency and blunted effect or lack of affect. He felt Wheat exhibited evidence of a fixed delusional system with respect to his special information concerning the Kennedy assassination and a conspiracy of the FBI and CIA to discredit him. Dr. Kaufman relied on diagnostic treatises, the petitioner's prior medical history, and the petitioner's trial counsel's testimony in reaching this conclusion.

However, Dr. Kaufman made it clear, and this is very important, that the plaintiff's mental disorder only affected the petitioner's ability to consult with his lawyer with a reasonable degree of rational understanding with respect to the introduction of psychiatric testimony and history at the sentencing phase of his trial. He conceded that the petitioner had a factual understanding of the nature of the charges against him and was able to relate to attorneys historical facts of the crime and even made charts and drawings of the crime area. The petitioner was aware that he could get the death sentence in both cases; he recognized the judges and knew why they were there; he knew he had a right to appeal after the first trial and ultimately exercised that right; and he related well with his attorneys and assisted in his defense by providing an alibi defense and suggesting questions on voir

dire and during trial. As Dr. Kaufman pointed out, and the cases recognize this, simply because someone is suffering from schizophrenia does not mean he is incompetent to assist in his defense.

Thus, it is really uncontradicted that the petitioner did have a rational understanding of the charges against him; he was oriented as well as anyone else during the trial; he had a factual understanding of many aspects of the case. Although he kept psychiatric testimony from reaching the ears of the jury, he freely discussed it with his attorneys and he knew the function of the jury in the imposition of sentence. This failure to present such evidence at sentencing stands out as the only possible sign of incompetency and even then only as to one isolated aspect of the proceedings against the petitioner. In all other matters, the petitioner was clearly

legally competent under the Dusky standard. Thus, we have little difficulty in concluding that the petitioner has failed to prove that he was incompetent at any time during the guilt/innocence phase of his trial.

Accepting the proposition that due to the bifurcated nature of capital proceedings, see Arizona v. Rumsey, ___U.S.____, 104 S.Ct. 2305 (1984); Bullington v. Missouri, 451 U.S. 430 (1981), we must also determine whether the petitioner was legally competent with reference to the sentencing phase.

Whatever qualitative differences exist between a death sentence and others, the standard for determining competency would still be the Dusky test. That is, "whether [the accused] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether

he has a rational as well as factual understanding of the proceedings against him."

The Dusky test is objective in nature. Its goal is not to determine whether an accused acted rationally but whether he had the present ability to rationally as well as factually understand the proceedings against him and to consult with his lawyer with a reasonable degree of rational understanding. Stated differently, the question is not whether one acted rationally, but whether one had the ability to so act. With this understanding, we think it rather clear that the petitioner did indeed possess this ability and even exercised it. Wheat certainly knew that the jury would determine whether the death penalty was imposed. He even consulted with his lawyer with this understanding. It is true that he did not cooperate with his attorneys on the issues surrounding the investigation of and

presentation of his past psychiatric evidence, but this does not necessarily mean that such was irrational or, more important, the produce of a mind incapable of rationality. If it were accepted that the petitioner's failure to cooperate was the result of a fixed delusional system, then it might be more easily stated that the petitioner lacked the requisite ability. While the data is mixed, we conclude that the petitioner's decision was not the produce of a fixed delusional system. The petitioner's statements to his trial counsel at the end of the first trial sentencing phase suggest this, as does the petitioner's statement to the district attorney sometime after the second trial, and statements made to Dr. Logan. These statements indicate that the petitioner was attempting to manipulate the legal system through confusion and subterfuge. In any event, we conclude that the petitioner

has failed to prove that it is more likely than not that his personality disorder precluded his ability to rationally consult with his attorney or rationally and factually understand the proceedings against him.

VIII.

CLOSING ARGUMENT -- SENTENCING PHASE

Petitioner's trial counsel began his closing arguments at the sentencing phase as follows:

> You know, I can't imagine what it would be like, truthfully, to be in your position. I guess, maybe, you can imagine what it would be like to be in my position, knowing that what you say may actually have a great determination whether a man lives or dies. I can't imagine what it would be like to sit on a jury like you are, and have to make a decision as to whether a man has killed or not. . . . You know, what you decide here today when you go out of here, when you come back, the decision if he should be killed somewhere, it may take--truthfully the way appeals go, it may take two or three years. But some day, just

> as sure as we are here now, they will take that man over there and they will walk him into a little gray looking chamber. . . . Some day, I want you to understand that; some day--I'm doing this to be morbid with you. I'm doing it to make sure that you really understand the gravity of the thing.

Later, it was argued "that man will never be paroled." He will never be set free. He'll be there for the rest of his life."

Apparently, in rebuttal to these arguments, the district attorney made the following comments:

> And another thing that Mr. Stegall said, Kenneth Wheat still gets another chance even if you find that he should suffer the penalty of death. This will not happen tomorrow. It will not happen next year. Why? Because in the first place there will be so many different panels reviewing your decision as to see if you made the right decision. First, his own honor her, will review your decision at a later time to see if you've made any errors; or if the lawyers made any errors. If the judge finds that I've committed some type error in the case, this judge right here has the authority to grant another trial. If he thinks that your verdict is not in accordance

with the law, he has a right to grant a new trial, and let twelve more people decide. And if he finds that he's in accord with your verdict, then we have nine Supreme Court justices at our state level who will look at every word that has been spoken, that this lady has taken down, will all be transcribed into a book form. Every piece of evidence that you see will go yonder to the Superme Court, and nine men with all their wisdom and knowledge and compassion and mercy and misunderstanding, and legal experience will look at all of this and determine whether Kenneth William Wheat got a fair trail at the hands of you twelve people in Harrison County, Mississippi.

Then if they decide, they have a right to send it back for another jury to look at it if they think we committed error in this case. If they find that no error was committed, then he has a right to go all the way to the United States Supreme Court. And this doesn't cost him one dime. Our system provides him this relief at no cost to him. And he goes all the way to the Supreme Court in Washington, where nine more men will have all of the same evidence to look at and determine whether this judge here or those nine judges in Jackson made a mistake. And if they find that he did, they will send it back for a new trial. Or they can go to the federal court route after that, and then have

federal judges to look at it and see if all the evidence was presented fairly and impartially.

So you see, ladies and gentlemen, its not like he will be killed tomorrow. Mississippi hasn't had anyone executed in a long time. There are twelve up there now. Six of them are from this jurisdiction. You're not going to be blazing any new trials. . . .

(supplemental record, 210-212)

Later in his argument, the prosecutor noted that the parole board must consider the petitioner for release after ten years if he is sentenced to life. (R. Supp. at 218)

Finally, the prosecutor, in closing, stated:

Again, I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There are so many more people who will look at this case after you have made your decision in this case. Others will look at, and look at your work, and see if you made the right decision. And I can assure you, ladies and gentlemen, that if one finds that you have not, that they will send him back, and tell us to

try it over, because some made a mistake.

By Mr. Stegall: May it please the court, I'm going to object to that again. He's telling this jury to go ahead and do something even if its wrong because if it's wrong, they're gonna send it back. That's not right. I'm gonna object.

By the Court: I think the argument was allowed. It was opened up on your argument. I'll overrule it.

(R. Supp. at 226-227)

Petitioner now claims that the prosecutor's above argument inpermissibly suggested to the jury that its sentence of death was not final and would not be carried out, thus depriving the petition of his right to due process of law at the sentencing hearing.

There can be no question that such argument exceeded permissible bounds of state law. In Howell v. State, 411 So.2d 772 (Miss. 1982), the Mississippi Supreme Court announced its rule that reversible error is committed

when a prosecutor injects into closing argument the idea that any error of the jury would be corrected on appeal where the jury was not also informed that they were the only fact finders, not the appellate court. The Howell decision was decided on March 22, 1982, after the filing of the petitioner's direct appeal and only shortly before the decision was rendered. Howell was a non-capital case but in Hill v. State, 432 So.2d 427 (Miss. 1983), the Mississippi Supreme Court addressed this type argument in the context of a death penalty case. The Court stated that such an argument was "clearly erroneous and . . . ordinarily . . . considered highly prejudicial . . . . In a death penalty case, a jury should never be given false comfort that any decision they make will, or can, be corrected." Id. at 43-.

Only recently the Mississippi Supreme Court noted that "our powers of appellate

review in death penalty case has been severely limited both as a matter of law and in actual practice and emphasized "that the jury's verdict at the sentencing phase is the single most important stage of the process of determining whether the defendant will live or die. The appellate court's role is secondary and subordinate, and our power to review is severely limited as a matter of law." Williams v. State, 445 So.2d 799, 811 (Miss. 1984) (emphasis added).

Of course, this Court does not sit as a "super state supreme court" in reviewing prosecutorial misconduct. Our sole focus is whether the prosecutor's action rendered the trial fundamentally unfair. Donnelly v. DeChristoforo, supra. "[M]ore than mere undesirability or even 'universal condemnation' must be shown. Unless a specific guarantee of the Bill of Rights is involved, it must be shown that the remarks were so prejudicial that they rendered the trial in question

fundamentally unfair." Cobb v. Wainwright, 609 F.2d 754, 755 (6th Cir. 1980) (footnote omitted). As such, the challenged remarks must be assessed within the context of the particular trial. Williams v. King, 573 F. Supp. 526, 530 (M.D.La. 1983)

Our assessment of the argument has been augmented by the very recent United States Supreme Court's opinion in Caldwell v. Mississippi, ___U.S.____, Slip Op. No. 83-6607 (decided June 11, 1985). Under Caldwell, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at ____, Slip Op. at 7.

Caldwell involved a prosecutor's closing argument similar in theme (and motive) to the one here; that is, that a sentence of death was automatically reviewable by the Mississippi Supreme Court and that the jury's decision was

not final, thus leaving the jury with mistaken impressions regarding their responsibility. Such argument

> offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called onto make a very difficult and uncomfortable choice. . . . [T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.
>
> This problem is especially serious when the jury is told that the alternative decision makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a

> "right to make such an important decision than has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great."

Caldwell, id., at ___, Slip Op. at 10-11.

A cursory comparison of the prosecutor's argument in Caldwell and those quoted above suggest a very real possibility that the jury which sentenced Wheat to die was far more misled that the one in Caldwell. Indeed, the argument here under review not only falls within Caldwell's majority's condemnation but also the dissent's. In this case the prosecutor argued, "Others will look at it, and look at your work, and see if you made the right decision. And I can assure you, ladies and gentlemen, that if one finds that you have not, they will send him back and tell us to try it over, because someone made a mistake." In dissent, Justice Rehnquist felt that the majority overstated and over-characterized the

prosecutor's argument but noted "[i]f the prosecutor in this case actually had argued to the jury that it should go ahead an impose the death sentence because it did not really matter--the appellate court would correct any 'mistake' the jury might make in choice of sentence--and if the trial judge had not corrected such an argument, I might well agree that the process afforded did not comport with some constitutional norm related to procedural fairness." Id. at _____, Slip Op. at 6 (Rehnquist, J., dissenting). The argument under review here certainly fits well within the dissent's view. Throughout the prosecutor's closing argument the jury was informed that many different panels would review their decision to see if the right decision was made. They were told that the state supreme court justices would employ all their wisdom, knowledge, compassion and mercy in reviewing the death sentence. They were

even told that if the state supreme court made a mistake, the United States Supreme Court would correct such an error. Although the argument was objected to, the trial court failed to correct the misinformation.

We find little to distinguish this case from the Caldwell decision. In short, "the state sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must, therefore, be vacated." Caldwell, id., at ___, Slip Op. at 1-. Caldwell compels such a conclusion.

CONCLUSION

Consistent with the Fifth Circuit's mandate in capital habeas cases that a "district court set forth those specific findings of fact and conclusions of law that

underlie its ultimate disposition of the case," Mathison v. King, 751 F.2d at 1436, n.5 (6th Cir. 1985), we have addressed every claim raised by the petition, with the exception of petitioner's double jeopardy claim (Claim J). We now address it. Citing Bullington v. Missouri, 451 U.S. 430 (1981), the petitioner claims that the jury's life imprisonment sentence in the trial for the murder of the young bride represents an "implied acquittal," of the death penalty, thus precluding the petitioner from being subjected to the death penalty in the trial at issue now. See also Arizona v. Rumsey, ___ U.S. _____, 104 S.Ct. 3305 (1984). The above cited cases are inapposite since here we are looking at two distinct murders whereas in the cases relied upon only one crime was involved. Nothing in the double jeopardy clause precludes the

state from seeking the death penalty in a related but distinct crime where the jury in the other case was unpersuaded that death was an appropriate sentence.

In summary, we reject as meritless each and every claim made by the petitioner attacking his conviction or sentence, save for the petitioner's claim that the prosecutor's closing argument at the sentencing phase of the trial violated the Eighth Amendment. Compelled as we are by the United States Supreme Court decision in Caldwell, we will enter an appropriate judgment vacating the death sentence.

This the _____ day of _____, 1985.

_____

CHIEF UNITED STATES DISTRICT JUDGE

KENNETH W. WHEAT

v.

MORRIS THIGPEN, COMMISSIONER, MISS. DEPARTMENT OF CORRECTIONS, EDDIE LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY IN THEIR OFFICIAL CAPACITY AND THEIR OFFICIAL CAPACITY AND THEIR SUCCESSORS IN OFFICE; AND THE STATE OF MISSISSIPPI.

No. 62780.

Supreme Court of Mississippi.

May 11, 1983.

Before the Court EN BANC.

BOWLING, Justice, for the Court:

Appellant filed his Motion for Leave to File Petition for Writ of Error Coram Nobis. At the same time, he filed a Motion for a Stay of Execution pending consideration of said motion. One of his attorneys, Robert E. Morin, Esquire, of Atlanta, Georgia, filed a motion for Leave to Appeal Pro Hoc Vise under the provisions of Mississippi Supreme Court Rule 27.

The motion of Attorney Robert E. Morin is granted.

The Motion for Stay of Execution of appellant is denied because of the following opinion and order on his Motion for Leave to File Petition for Writ of Error Coram Nobis.

A number of claims are propounded in appellant's Motion for Leave to File a Petition for Writ of Error Coram Nobis, a copy of the proposed petition is attached to appellant's motion. We shall hereinafter consider each claim separately.

CLAIM A.

THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO PETITIONER'S COMPETENCE AT THE TIME OF TRIAL.

[1] This claim was presented as an alleged trial error in the appellant's original appeal to this Court and a final disposition was made thereof. See Wheat v. State, 420 So.2d 229 (Miss. 1982). The opinion, based on the entire record before the Court, fully discussed the proceedings had in the lower court and the opinion fully explained the Court's decision on the question involved in Claim A. It should be noted that appellant did not file a Petition for Rehearing of the Court's opinion and final decision within fifteen days after said final order, as permitted by Mississippi Supreme Court Rule 14. We therefore hold that all matters propounded in Petitioner's Claim A were decided on direct appeal to this Court and are

therefore barred from re-litigation as requested by appellant. This decision is completely in conformity with the record in the cause and this Court's final opinion. Edwards v. Thigpen, decided March 23, 1983, and not yet reported; Callahan v. State, 426 So.2d 801 (Miss. 1983); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2498, 53 L.Ed.2d 594 (1977); Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982); Eagle v. Isaac, 456 U.S. 108, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Appellant contends in his motion that he is presenting "new" evidence on appellant's prior mental condition that was unknown by his attorneys at the trial. The motion filed by appellant's court-appointed attorneys during the course of the trial for the death of Mrs. Mayer recited that, in addition to other reasons, the motion for mental examination was being filed "because of the past medical

history of the defendant." [Supp.Rec.V.I,p. 47] Furthermore, the affidavit of Earl B. Stegall and John F. Hester court-appointed trial attorneys for appellant, which affidavit is attached to the brief of appellees herein, states that the office of the district attorney had made the medical records of appellant available to them. Their use was refused by appellant.

A reading of the opinion Wheat v. State, supra, shows that this fact was taken into consideration in the final decision, from which a petition for rehearing was not requested. As set out in the opinion in Wheat v. State, supra, the trial court ordered a mental examination of appellant pursuant to the allegations of the motion containing the above quoted language. As stated in this Court's opinion, appellant refused to have the examination after receiving a life sentence from the jury.

CLAIM B.

COMPETENCE AT TRIAL AND SENTENCING.

It is noted that appellant's brief in support of his Motion does not follow the listed Claim points in the proposed Petition attached to his motion filed before this Court. In the proposed Petition requested to be filed in the lower court, all of the contentions under Claim B were discussed and finally decided in this Court's opinion in Wheat v. State, supra, are res judicata here, and are therefore procedurally barred from further consideration. Although we have fully studied appellant's brief in support of his motion, we necessarily are required to discuss each point set out in the proposed petition requested to be filed with the lower court.

CLAIM C.

MENTAL ILLNESS.

It is required that Claim C be denied for the reasons set out in Claim A and B.

CLAIM D.

USE OF PETITIONER'S INCRIMINATING STATEMENTS.

Petitioner contends that the court erred in admitting voluntarily written documents composed by appellant while in confinement and forwarded to law enforcement officials. At a pre-trial hearing before either case was tried, a motion was heard requesting that these statements be suppressed. We are here repeating what is said in the final opinion and decision of this Court in Wheat v. State, supra, clearly reveals that appellant's contention under Claim D was fully discussed

and decided therein. We are therefore barred from considering a repetition of that claim here.

CLAIM E.

IMPROPER INSTRUCTIONS-GUILT-INNOCENCE.

A reading of the Court's opinion, from which a petition for rehearing was not requested, reveals a full discussion of the points under this claim and a finding that there is no merit to the claim.1 We therefore hold that this Claim E cannot be reconsidered by the Court under this petition.

CLAIM F.

IMPROPER CLOSING ARGUMENT-GUILT-INNOCENCE.

[2] An examination of the record does not show the preservation of error under this claim during the trial or post-trial level. Any alleged error was not preserved so as to present it before this Court in the present petition.

Furthermore, neither Claim F nor any part thereof was assigned as error in the appeal of this Court. We therefore hold that we are procedurally barred under the hereinbefore cited authorities from considering Claim F of the proposed petition.

CLAIM G.

IMPROPER INSTRUCTIONS-SENTENCING.

The record reveals no preservation of any alleged error during the trial or post-trial level in regard to instructing the jury as to the aggravating circumstances of "especially heinous, atrocious or cruel." The lower court was not requested and was not given an opportunity to correct any alleged error in this regard. No alleged error, as set out under Claim G, was presented to this Court for decision, and for these reasons we are procedurally barred from considering this contention under the proposed petition requested to be filed.

CLAIM H.

IMPROPER CLOSING AGRUMENT-SENTENCING.

The same legal situation is involved in Claim H as was involved and discussed under Claim F. We are procedurally barred from considering the request under Claim H for the reasons previously stated.

CLAIM I.

VIOLATION OF THE BAR OF DOUBLE JEOPARDY.

The proposed contentions to be presented in the proposed petition to the lower court under this Claim were fully discussed in the opinion of Wheat v. State, supra, from which no petition for rehearing was filed.

It is pointed out that the proof in the two cases was different in that the evidence in the case sub judice is uncontradicted that the vehicle and its contents were owned by Mr. Mayer, not Mrs. Mayer. As pointed out in the final opinion, this Court cannot speculate on a

jury's deliberation, but that a sufficient explanation of the different penalty verdicts easily could have been the requirement of the state proving the underlying felony. Regardless of this, we are here barred from considering the request in Claim I, as these requests were fully discussed and determined in the opinion Wheat v. State, supra.

CLAIM J.

INEFFECTIVE ASSISTANCE OF COUNSEL.

[3] The opinion in Wheat v. State, supra, held as a finding of fact that "the record reveals that appellant's trial attorneys were competent and defended appellant in a vigorous and efficient manner. He received a fair trial." There is not petition for rehearing from this finding and this is sufficient to require a holding that we are now procedurally barred from re-examining that decision. In so holding, the Court necessarily considered the

entire record in the cause. The pronouncement in the opinion pertained to the trial attorneys. As shown by the record during the appellate procedures, appellant discharged his court-appointed attorneys and employed an attorney of his own choice. As shown by the record, appellant had over $17,000 on deposit at that time, [Supp.Rec.V. III, p. 183].

We are barred from re-litigatingour decision regarding the competency and efficiency of appellant's attorneys.

CLAIM K.

APPELLATE REVIEW.

The request in this Claim to be presented to the lower court in appellant's proposed petition is raised for the first time in the present petition now being considered. These contentions were not raised in the court below, were not raised before this Court on appeal, and were not raised in a permitted petition for

rehearing after the opinion of the Court was published wherein a discussion of prior cases was made.

Furthermore, this claim is directed solely to the appellate court and has no place, and cannot be included, in a coram nobis hearing before the trial court.

CLAIM L.

RELIEF REQUESTED

For the reasons hereinbefore set out, each and every claim propounded by appellant in his proposed petition for writ of error coram nobis to be filed in the trial court is denied.

The Motion of Robert E. Morin, Esquire, to appear in the courts of this state in this case is granted.

The motion for leave to file a Petition for Writ of Error Coram Nobis is denied.

The Motion for Stay of Execution of appellant is denied.

KENNETH WILLIAM WHEAT

V.

STATE OF MISSISSIPPI

NO. 52,780

Supreme Court of Mississippi

October 6, 1982

Before the Court En Banc.

BOWLING, Justice, for the Court:

Appellant Kenneth William Wheat was indicted for the crime of capital murder of Joseph M. Mayer while attempting to commit the crime of robbery by the Grand Jury of the First Judicial District of Harrison County. He received a bifurcated trial before the same jury as authorized by statute and the former decisions of this Court. After the first stage of the trial, the jury returned a verdict finding appellant guilty of capital murder. After the sentencing stage of the trial, the jury returned a verdict sentencing appellant to death. This appeal follows in accordance with Mississippi Code Annotated, Section 99-19-105 (Supp. 1981).

At the outset, we recognize that in this opinion it shall be necessary to refer to another indictment and conviction of appellant for the alleged capital murder of Teresa C. Hayes Mayer, wife of Joseph M. Mayer. In that cause appellant was found guilt of capital murder by the jury, but the same jury was unable to agree on a sentence; after which the trial court sentenced appellant to life under the supervision of the Mississippi Department of Corrections. The Harrison County Circuit Court docket number of the cause involving the death of Mrs. Mayer was Number 17,101 and the present cause in the lower court was Number 17, 102. Appellant interjected preliminary motions before the first trial for the death of Mrs. Mayer, which motions were filed in both causes as one motion, bearing both docket numbers, and heard by the lower court prior to the first trial. It, therefore, is necessary to refer to the first trial for specific purposes brought out in the present appeal.

On July 28, 1979, two young people, Joseph M. Mayer and Teresa Carol Hayes, were married in Paducah, Kentucky, the home of the couple and their families. After the marriage, they left on their honeymoon to the Mississippi Gulf Coast, intending to spend the first night in Memphis, Tennessee, which they did. The parents were called at about 9:20 that evening from a motel in Memphis. The next that was heard from the young married couple was on the evening of Sunday, July 29, 1979, when Joseph M. Mayer called his father at 9 p.m. from a pay station immediately outside the Worth Motel on the beach at Gulfport in the First Judicial District of Harrison County. Young Mayer talked with his father for twenty minutes. After completion of this conversation the young couple were not heard of again until their bodies were found on July 31, 1979, in a wooded area north of Gulfport. Their hands and feet were tied behind them and each was shot in the back of the head.

The Mayers left Kentucky on their honeymoon in a 1976 Cutlass automobile owned by young Mayer. The car had attached to it a Kentucky license plate. Shortly after publicity was circulated regarding the finding of the bodies and a description of the car, four people who lived near the place where the bodies were found reported to the sheriff's office that they had had an experience with a man driving a car of that description near their home at about midnight on the night of Sunday, July 29. In the home lived Mr. and Mrs. Algie Netto and Mrs. Netto's two sons, Gary Wayne Walker and Eugene Walker, ages 26 and 27. Around midnight or a little after, a man knocked on the door of the residence and upon being admitted, stated his car had run into a ditch a short distance down the road and asked for assistance in getting it back onto the roadway. The two Walker brothers drove the man back to the place where the car was stuck

in their vehicle. They found that one of the car's tires was flat. The spare tire was exchanged for the flat tire, and the Walker brothers attempted to get the car back on the roadway but were unable to do so. They then went back to the residence to secure the help of their step-father, Algie Netto. The latter drove his tractor to the scene and was able to pull the car back on the roadway. The drive of the car then drove to the Netto residence and stayed there for a period of time drinking ice water and talking. He then left in the Cutlass with the Kentucky license plate.

The Walker brothers testified that during the ride from their residence to the Cutlass car, the car's driver sat between them in the pickup truck. They testified that they were able to observe him fully. They also testified they were able to observe him fully at the scene, as their vehicle's lights were left on for assistance in working on the Cutlass. Mr. and Mrs. Netto and the Walker brothers stated

that they had ample opportunity to see thedriver of the car fully while he was at their residence drinking water.

A description of the man in the Cutlass was given to the artist connected with the sheriff's department. From these descriptions a composite sketch of the man was made and immediately circulated. Shortly thereafter Deputy Sheriff Harold Lloyd Wheat [no relation to nppellant] of adjoining Pearl River County, contacted the Harrison County Sheriff's Department and advised that the composite sketch resembled appellant, who was reared in that county, but had been away from the state for a number of years.

On October 19, 1979, appellant was arrested in Orlando, Florida, and later returned to Harrison County, Mississippi, under the charges of murdering the Mayers. In the meantime, subsequent to the completion of the official investigation, appellant was indicted on September 28, 1979, by the Harrison County Grand Jury.

As hereinbefore stated, appellant was first tried in December 1979, for the alleged capital murder of Mrs. Mayer. The trial of the cause sub judice began on January 14, 1980, and ended on January 18, 1980. At the trial, Mr. and Mrs. Netto and Gary and Eugene Walker positively identified appellant as the man who was driving the Mayer's car at about midnight on the night the Mayers were last heard from at approximately 9:30 p.m. They described his appearance in detail, including his clothing. They positively identified a photograph of the Mayer car as the one occupied and driven solely by appellant on the night the Mayers met their death. A cashier at a local restaurant near the Worth Motel testified from photographs that the Mayers came in for dinner about 6:30 p.m. on Sunday, July 29, and were there about one or one and a half hours. She testified that they were alone during the entire time.

A relative of appellant testified that he had known appellant all his life, and in March 1979, he was called by appellant to come and get him at a bar in Harrison County. Appellant according to the relative had been gone from the State of Mississippi about nineteen years and talked with an accent he did not have when he left the state. [The Nettos and Walkers also testified appellant talked with an accent on the night the Mayers met their death.] The relative testified that from March 1979 until about the time of the Mayers' deaths, appellant stayed at either his house or the house of another relative. He never saw appellant after the Mayers were found dead. He testified that during the time appellant was staying at this house or the other relatives' house, appellant had a Vandyke beard. [The Nettos and Walkers testified appellant had a Vandyke beard.] Another relative Dwayne Wheat testified that he went with appellant to the County Courthouse and helped him secure a driver's license. He testified the last time he saw appellant was about July 28, 1979.

Linda Perry, daughter of Earl Wheat and cousin of appellant, testified she last saw appellant on Saturday, July 28, 1979.

Testimony was admitted from All Winchell, jailor with the Harrison County Sheriff's Department. He testified on November 29, 1979, appellant called him to his cell and gave him a sealed envelope addressed to Jim Kelly, head jailor, which Winchell immediately gave to Kelly. This note was introduced in evidence and read: "Notify my lawyer and Sheriff Hobbs that I want to plea guilty to the Mayer murder charges tomorrow and I want to be sentenced next week. Kenneth Wheat. 11-29-79." Mr. Kelly immediately notified the sheriff and appellant's attorney. Later the same day, Wheat gave the jailors another hand written note stating that he was innocent of the Mayer murderers, but in order to spare himself and his family the suffering, he was pleading guilty. He headed this note "Press Release."

Orlando Florida Police Officer Stephen Finkel testified that upon the arrest of appellant, he first gave a fictitious name but later admitted he was Kenneth Wheat and was wanted for murder in Mississippi.

Appellant propounds five assignments of error in this appeal:

> I. THE COURT ERRED WHEN IT FAILED TO REQUIRE THE DEFENDANT TO UNDERGO A MENTAL EXAMINATION TO DETERMINE HIS COMPETENCE TO STAND TRIAL, AND HIS COMPETENCY AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE.
>
> II. THE COURT ERRED WHEN IT FAILED TO DIRECT A VERDICT FOR THE DEFENDANT AT THE CLOSE OF THE STATE'S CASE AS TO THE CRIME OF CAPITAL MURDER.
>
> III. THE COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY AS TO LESSER INCLUDED OFFENSES OTHER THAN CAPITAL MURDER, AND IN FAILING TO ALLOW THE JURY TO CONSIDER LESSER INCLUDED OFFENSES OTHER THAN CAPITAL MURDER.

IV. THE COURT ERRED WHEN IT ALLOWED THE JURY TO CONSIDER THE DEATH PENALTY FOR THE DEFENDANT, IT SHOULD HAVE DIRECTED A VERDICT AS TO SENTENCE, AND SHOULD HAVE SENTENCED THE DEFENDANT TO LIFE IMPRISONMENT.

V. THE COURT ERRED WHEN IT INCORPORATED THE RULING OF THE PREVIOUS COURT DENYING A MOTION TO SUPPRESS CERTAIN ORAL AND WRITTEN STATEMENTS, WITHOUT RECONSIDERING THE SAME.

ASSIGNMENT NO. I.

This assignment challenges the alleged failure of the court to require that the defendant have a mental examination to determine his competency to stand trial and his competency at the time of the alleged crime. In order to get a complete picture of all

matters surrounding the admitted failure to appellant to undergo a mental examination, we need to look at the complete history of that issue. On November 15, 1979, appellant's attorney filed a "Motion for Mental Examination." He filed one instrument in both indictments with the instrument carrying the circuit court numbers of both indictments. The motion was filed under MCA §99-13-11 (1972), which provides that the trial court may order an accused to submit to a mental examination on motion made by the defendant, the district attorney, or the court's own motion. A hearing was had on the motion before Circuit Judge Leslie B. Grant on November 28, 1979. It should be noted that all three of the circuit judges in the district were involved in either motions or trial under the two indictments of appellant. Before the hearing on the motion began, appellant's attorney announced to the court that after advising appellant that the

motion had been filed, appellant advised the attorney that he "would not voluntarily in any event" under go such an examination. The attorney requested that he be allowed to withdraw the motion without hearing. The appellant was in the courtroom during the hearing. He was asked by the trial judge if he understood that the motion had been filed, and received an affirmative answer. Appellant was then asked if he understood that he was requesting that the motion be withdrawn. The court again received an affirmative answer. The court asked appellant, "Do you agree with that request?" Appellant's answer was, "Yes, sir." Accordingly Circuit Judge Grant stated that, "It does not appear to the court that he needs a mental examination and therefore the request to withdraw the motion is granted and the motion is considered withdrawn." A written order allowing the withdrawal was signed by Judge Grant and filed in both causes.

On November 30, 1979, the state through the district attorney filed a motion for mental

examination of appellant. [Supp. Record Volume I, p. 44]. The motion recited the withdrawal of the motion filed by appellant and stated that due to the appellant's writing the two hereinbefore discussed notes to the jailor, that the state wished a mental examination of appellant. A hearing was had on this motion on November 30. [Supp. Record Volume II, p. 114]. This hearing was had before Circuit Judge Ruble Griffin, who later was the trial judge under the indictment for the death of Mrs. Mayer. The state's motion, as was the appellant's withdrawn motion, was a single instrument filed under the style and numbers of both indictments. The appellant was present in the courtroom during the hearing on the state's motion. The district attorney made an oral statement that is shown in the record regarding the two notes written voluntarily by appellant. The district attorney stated his doubts that appellant was insane, but it was thought by the prosecution that a mental examination should be had to be sure. Stating

that, "I don't want the defendant setting the state up . . . ." and "I don't want it to go unnoted that the state did not make an attempt."

It should be noted at the outset that appellant's attorney objected to the motion being granted, as only two days before appellant's motion had been withdrawn. Regardless of the objection of appellant through his attorney to the motion, the lower court properly proceeded to have a hearing on the motion under the strenuous objection of appellant and his attorney. After these objections and the statements by appellant's attorney that he and appellant were communicating satisfactorily, the following occurred: [Supp. Record Volume II, p. 122].

> BY THE COURT: May I ask Mr. Wheat a question? Mr. Wheat, do you understand why it is you were brought back up here again today?

BY THE DEFENDANT: Yes, Sir. Do you want me to stand up?

(THE DEFENDANT STANDS BEFORE THE COURT)

BY THE COURT: Of course, that being that the District Attorney filed a Motion to have you examined by a psychiatrist. My understanding is you previously before Judge Grant, who had heard all of the motions up to this point. I'm Judge Griffin. I'm the one who will be trying your case if we go to trial next week. It is my understanding that Mr. Stegall did file a Motion to have you examined by a psychiatrist.

BY THE DEFENDANT: I withdrew it.

BY THE COURT: You wanted him to withdraw it. Is that correct? What is your attitude about the motion today?

BY THE DEFENDANT: What?

BY THE COURT: What is your attitude about the District Attorney's Motion? Is it the same?

BY THE DEFENDANT: Well, I think I'm sane. I don't require a. . . .

BY THE COURT: Just go ahead and explain it to me however you want to.

BY THE DEFENDANT: If the Court orders it I'm going to refuse it. I'm ready to go to trial Monday.

BY THE COURT: You say that you would refuse it?

BY THE DEFENDANT: Yes, Sir.

BY THE COURT: By that--Of course, we could physically remove you to the psychiatrist's office. You understand that?

BY THE DEFENDANT: I would remain silent.

BY THE COURT: You would remain silent. Of course, I cannot make a man talk. I don't have that power; and without him talking, Mr. Necaise, I don't think it . . .

BY MR. NECAISE: I'll ask the Court to inquire any further if he has desires of having one, or if he resists . . .

BY THE COURT: If he says he is not going to talk to one, I think the answer to that question has already been made.

BY MR. NECAISE: Could I ask the Judge to ask him that question for the purpose of the record?

BY THE COURT: All right. Are you desirous of having an examination? I believe that was the question.

BY THE DEFENDANT: I said if the Court appoints--demands that I--I can't hear too good. I've got an ear infection in both ears. I can't hear myself talk. If the court orders the examination I'm going to refuse to say anything to the psychiatrist. That's how it is.

BY THE COURT: In other words you don't want one?

BY THE DEFENDANT: Right. That's a way of saying it.

BY THE COURT: That's right. I think you're absolutely correct. There's no doubt about that. Are you hard of hearing, Mr. . . . ?

BY THE DEFENDANT: I have an infection in both ears. I had to see a doctor today; so, I can't hear too good. Both my ears are infected.

BY MR. STEGALL: Normally, Judge, his hearing is good.

BY THE DEFENDANT: Normally I have good hearing.

BY THE COURT: Oh, I see. Well, I notice you speak rather loudly. Sometimes people with poor hearing do talk louder.

BY MR. STEGALL: I told him to speak up to you, Judge.

BY THE COURT: Oh, you did? Well, he's responding to your advice. There's no question about that.

BY THE DEFENDANT: I have to hear myself talk. You know, I can't . . .

BY THE COURT: Yes. And have you ever been treated by a psychiatrist, Mr. . . . ?

BY THE DEFENDANT: Yes.

BY THE COURT: Where was that, Mr. Wheat?

BY THE DEFENDANT: Most people who go to prison for a long time require psychiatric help because prisons are snake pits in New Jersey. It's a big insane asylum, you know; and . . .

BY MR. STEGALL: Could I have the Court's indulgence?

BY THE DEFENDANT: . . . problems, you know? It includes the prison officials as well as the inmates.

BY THE COURT: Well, this is not going to be held against him in this hearing. I think I am entitled to let him respond to the question. I'm not going to be a witness against him.

BY MR. STEGALL: No, sir. I'm not concerned about the court.

BY THE COURT: And what he said here is not going to be used against him. You understand that?

BY THE DEFENDANT: Yes, Sir. but I'm saying it's not uncommon for a prison or prisoner in Trenton State Prison to be under psychiatric care. The majority of the inmates are. And a lot of times they may try to get themselves sent to the State Hospital because it's a lot better place than Trenton Prison. You've got more privileges; so, inmates try to play crazy to get sent there, not because they are crazy.

BY THE COURT: I don't doubt that at all, and I feel a little sympathetic with them. Go ahead. Do you have anything else you want to tell me?

BY THE DEFENDANT: I'm finished. I'll see you in trial Monday.

BY THE COURT: All right, Sir. Well, Mr. Necaise, I feel this way about it. I can't make a man talk to a psychiatrist; and Mr. Wheat has told me unequivocally--Let me ask you one other thing. Did you ever get a report from any psychiatrist, Mr. Wheat? Never did receive one?

BY THE DEFENDANT: They keep everything secret in prison.

BY THE COURT: Nobody has ever advised you that you do need medical treatment?

BY THE DEFENDANT: They say everybody in prison is crazy. All inmates are crazy. If they weren't crazy, they wouldn't be in prison. That's the way they think, you know? Sane people stay free, and crazy people wind up in prison, you know? I don't think I need any treatment right now. I'm fully prepared to go to trial and communicate with my lawyer in every way.

BY THE COURT: Well, of course, Judge Grant has already made a finding rather unequivocally that it didn't appear to him that the

man needed any treatment. He hadn't indicated anything to me today that would cause me to think differently from what Judge Grant found. So, I find that the man's rational, able to communicate with his attorney, has expressed a desire to stand trial, and as far as his correspondence and things that he has done in the past, even in relation to this case, like statements made to the paper in Orlando, I'm not going to inquire into his motives in making those statements. I assume that he had it at least in his own mind, a good motive; and a motive, not good; but that would probably be a mistake to state that; but a motive that was in his own best interest. I think he is able to form motives, intent, that would be in his own best interest. Is that right, Mr.? And whatever purpose he made that, I think he felt like it might be to serve him well to make those type of statements; and I think he is nodding that he did do that. So, I think it would just be a waste of time to have the man--try to attempt to have the man examined in light of his statements that he has

made here today. We can't anticipate everything that's going to happen two years from now or a year from now in the State Supreme Court or some federal court on petition for Writ of Habeas Corpus. I just can't anticipate all of that. As far as I'm concerned the man is ready to go to trial, able to go to trial. There's no doubt in my mind about that. I deny the State's motion and send him back to jail; and have everybody here at 10:00 Monday morning. I've had the jury ordered to come in at 9:30 to get the little cards filled out, so everybody can get a better look at who's here and all that; but I don't see the point any further on this. That's all. I don't like to disagree with the District Attorney, but in this case I do. I can't see there's any point in this. All right. Okay. You go back to jail.

BY MR. STEGALL: Thank you your Honor.

As hereinbefore stated the trial on appellant's indictment for capital murder of Mrs. Mayer was had the first week in December 1979 and ended on December 7. After the guilt phase of the trial was presented to the jury, the verdict was brought back finding appellant guilty of capital murder on the morning of December 7. Immediately thereafter, and with appellant facing a possible sentence of death, his attorney filed another motion for mental examination of appellant. [Supp. Record Volume I, p. 47]. A hearing was had on this motion out of the presence of the jury and appears beginning at page 104 of Supp. Record Volume I. The Court requested appellant's attorney to ask him if he had changed his mind since insisting that the pre-trial motion for mental examination be withdrawn. The appellant then stated he had changed his mind and wanted an examination. The trial court held that it was going ahead with the sentencing phase of the bifurcated trial, but was going to sustain the motion for mental examination at the conclusion

of the trial. Evidence was then presented on the sentencing phase and as hereinbefore stated, the jury was unable to agree on a verdict which resulted in the appellant receiving life sentence.

On December 11, 1979, four days after the conclusion of the trial, the trial judge entered a written order requiring a mental examination of appellant, naming the physician who would make the examination. [Dr. Henry Maggio, Supp. Record Volume I, p. 57]. The court in its order directed that the sheriff transport the defendant to and from Dr. Maggio's office.

What occurred after the court entered its order of December 11 appears in the hearing on appellant's motion for new trial after his conviction of capital murder of Mrs. Mayer [Supp. Record Volume I, p. 6]. At the outset of the hearing on the motion for new trial, appellant's attorney stated that appellant had requested him to advise the court he did not wish to proceed any further with any appeal.

Appellant's attorney stated, however, he wished to proceed with the hearing on his motion for new trial. appellant's attorney agreed that on December 7 after the jury's verdict on the guilt phase, appellant stated he had changed his mind and did want to undergo a mental examination. His attorney then went on to say that after the jury was unable to agree on a verdict in the penalty stage, the appellant had changed his mind and refused to undergo the examination ordered on December 11, even though he actually was carried before Dr. Maggio. [Supp. Record Volume I, p. 18]. The defendant requested that he be allowed to make a statement and the following colloquy of questions and answers were had between the trial judge and defendant:

> BY THE DEFENDANT: I've been under a lot of pressure to submit to a psychiatric examination by a lot of people. And, uh, I definitely don't want to be examined and that's sort of the story. And, uh, I've come to this

conclusion about not wanting to appeal. Uh, it's taken me a lot of time to think about it as a result of careful deliberation and, uh, it's not because I'm crazy like Mr. Stegall says.

BY THE COURT: Well, I don't think Mr. Stegall is accusing you of being crazy. Mr. Wheat. I think Mr. Stegall is a very sincere attorney and, uh, if there's any doubt about that, he wants it resolved and he wants to take advantage of every, uh, honorable, legal remedy that's available to him, for your benefit. That's Mr. Stegall's purpose of it by, uh, . . .

BY THE DEFENDANT: (Interposing) I realize that.

BY THE COURT: Yes, sir. You realize that.

BY THE DEFENDANT: Yes, sir.

BY THE COURT: And you're not mad with him because he raised the issue, are you?

BY THE DEFENDANT: Oh, no, no, we're still good friends.

BY THE COURT: All right.

BY THE DEFENDANT: We're still good friends.

BY MR. STEGALL: I thank you.

BY THE COURT: All right. Uh, of course, I'm going to, you can have your appeal without cost to you. Uh, I don't know what you want to, uh, I want you to think about it further.

BY THE DEFENDANT: I've already thought you see, I believe that the, uh, that if I appeal, it will be a repeat of the same thing, of the same thing, of the first trial. And I can't see making a . . . go through this, you know, making a repeat performance.

BY THE COURT: Well, you're still facing another trial.

BY THE DEFENDANT: Right, right, right.

BY THE COURT: Here.

BY THE DEFENDANT: If I get a gas chamber verdict in the second trial, I will appeal.

BY THE COURT: Then, you can't . . . . .

BY THE DEFENDANT: (Interposing) I promise you that.

BY THE COURT: Then, you can't appeal this one because you will have waited too long.

BY THE DEFENDANT: What?

BY THE COURT: You will have waited too long to perfect an appeal in this case, you see. . . . .

BY THE DEFENDANT: (Interposing) I said, I said. . .

BY THE COURT: . . . . . if you wait till then.

BY THE DEFENDANT: I said if I get a gas chamber verdict in the second trial, I will appeal that.

BY THE COURT: That case only?

BY THE DEFENDANT: Right, right.

BY THE COURT: Oh, I. . . . . .

BY THE DEFENDANT: (Interposing) This one right here, it's uh, it's over and done with as far as I'm I'm concerned.

BY MR. STEGALL: Judge, I'd like to talk with him further.

BY THE COURT: All right. I think you ought to consult with Earl further about it, Mr. Wheat, and, uh, you all talk about it. Of course, I'll grant you an appeal without cost to you, you understand.

BY THE DEFENDANT: All right. But, uh, nothing he can say or do is going to make me change my mind. I definitely don't want to appeal.

BY THE COURT: Well, I want you to give that to him in writing.

BY THE DEFENDANT: All right. Why can't we do it here, now?

BY THE COURT: No, sir. I'll let you do it in your uh, when you're in solitary by yourself. And, uh, I think it would work out better that way.

BY THE DEFENDANT: We, uh, have a little misunderstanding, you know, from time to time, buy, uh, basically, we get along good, you know.

BY THE COURT: Well, that's natural. I've never known a lawyer and his client that didn't have some misunderstanding. It would be highly unusual if they didn't.

BY THE DEFENDANT: Right.

[1] Summarizing what occurred regarding the mental examination of appellant, we have the following: his attorney filed pretrial motions in both causes which were withdrawn at the demand of appellant with the trial judge questioning appellant and ruling that he was entitled to withdraw his motion and he did not appear to need an examination. The state then out of an abundance of caution filed its own motion two days later requesting that appellant

be forced to have such examination. Appellant stated positively that he would refuse to undergo such an examination and would stand mute. The court questioned appellant extensively and came to the conclusion that he did not meed a mental examination. After the trial of the first case on the guilt phase, the appellant facing a possible death penalty changed his mind and stated he would agree to an examination. The lower court stated that an order would be entered after the conclusion of the trial to have a mental examination of appellant. In the meantime, however, appellant did not get the death penalty, so he again changed his mind and refused to have the ordered mental examination, even though being carried before an examining psychiatrist. It is evident that appellant was merely playing with the court. All three circuit court judges gave appellant every opportunity to have an examination. It should be pointed out here that at no time did appellant or his attorney propound insanity as a defense to either

indictment. In fact, it was announced to the court that appellant was not making a defense of insanity. [Supp. Record Volume II, p. 121]. We find no merit in appellant's first assignment of error. Whatever error was committed was done by appellant alone and was done according to the record in a rational manner.

ASSIGNMENT OF ERROR NO. II

[2] Appellant contends under this assignment of error that he could not receive the death penalty as there was no proof of the crime of robbery in connection with the alleged murder. No authority or discussion is needed on the proposition that a person cannot be convicted of capital murder and receive the death penalty unless the alleged murder is done under certain circumstances. One provision of which is stated "When done without any design to effect death by any person engaged in the commission of the crime of rape, burglary, arson, or robbery, or in any attempt to commit such felonies." [MCA § 97-3-19 (1972)].

It is the contention of appellant that the testimony in regard to the taking of the car of the deceased was not "an intent to commit robbery." Appellant requested and received an instruction (D-13) defining robbery, which stated:

> The elements of the crime of robbery are that the defendant must have intentionally and without authority of law taken the personal property of the said Joseph Mayer in his presence and against his will, by violence to his person or by putting him in fear of some violence to his person.

At approximately 9:30 p.m. on the night Joseph Mayer was killed, he was at the Worth Motel on the beach 26 miles from where he was killed that same night. The jury found that appellant killed him. approximately two and one-half hours after the young couple were together at the motel, appellant appeared at the Netto home with the Mayer car which place was approximately 1.4 miles from where Mayer was killed. Appellant was in complete possession of the Mayer car, along with its contents, consisting of a leather case,

luggage, books, camera, radio, baseball bat, and maps.

This Court had a similar set of facts before it in the case of Voyles v. State, 362 So. 2d 1236 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S. Ct. 2184, 60 L. Ed. 2d 1059 (1979). We said the following in that case:

> Appellant contends that the evidence was not sufficient for the jury to find beyond a reasonable doubt that the alleged killing occurred while appellant was engaged in committing the crime of robbery and, therefore, the appellant could not be guilty of the crime of capital murder, which is a crime punishable by death. Miss. Code Ann. § 97-3-19 (Supp. 1977). There is no contention that the jury was not completely, fully, and adequately instructed by the court on the questions of law involved in a so-called felony-murder. The court fully instructed the jury on the statutory definition of robbery, which, according to Code section 97-3-73, is as follows:
>
> > Every person who shall feloniously take the personal property of another in his presence or from his person and against his will, by violence to his person or by putting such person in fear of

some immediate injury to his person, shall be guilty of robbery.

Appellant questions the sufficiency of the evidence to prove that he had the "intent" to commit the crime of robbery. This Court said in Shanklin v. State, 290 So. 2d 625 (Miss. 1974):

> Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case. The intent to commit a crime or to do an act by a free agent can be determined only by the act itself, surrounding circumstances, and expressions made by the actor with reference to his intent. Thompson v. State, 258 So. 2d 448, (Miss. 1972); Lee v. State, 244 Miss. 813, 146 So. 2d 736 (1962).

The Court further said in Thompson v. State, 258 So. 2d 448 (Miss. 1972), the following:

> Unless one expresses his intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident.

The criteria for this Court to use in passing on a motion for a directed verdict which was requested under this assignment by appellant is stated in Bullock v. State, 391 So. 2d 601, 610 (Miss. 1980).

> In passing upon a requested peremptory instruction, or motion for directed verdict in a criminal case, all evidence most favorable to the State, together with reasonable inferences, are considered as true and evidence favorable to the appellant is disregarded. If such evidence will support a guilty verdict, the request for peremptory instruction must be denied, as well as the motion for directed verdict. Warn v. State, 349 So. 2d 1055 (Miss. 1977); Toliver v. State, 337 So. 2d 1274 (Miss. 1976).

Fully considering the history of all that occurred on the night in question, the condition of Mayer's body with his hands and feet tied, and a bullet hole through the back of his head and shortly thereafter appellant being solely in full possession of the Mayer vehicle and its contents, is clearly a question for the jury as to whether or not he "robbed" Mayer of his car. There certainly is no other reason shown in this record for the brutal murder of young Mayer.

ASSIGNMENT OF ERROR NO. III

[3] This alleged assignment of error may be disposed of merely by stating that the appellant did not request an instruction as he alleges in this assignment. The court fully instructed the jury as to all elements to be considered in finding that the killing of Mr. Mayer was "capital murder" rather than "murder," for the reasons discussed in Assignment No. II. Furthermore, appellant did not request an instruction on a lesser included offense as he now contends should have been

given. As discussed in Assignment II the jury had ample evidence to find that the alleged murder was perpetrated during an intent to commit robbery. The jury was amply instructed that it was necessary for them to so find before returning a verdict of capital murder. We find no merit in this assignment of error.

ASSIGNMENT OF ERROR NO. IV.

[4,5] Appellant contends that he should have been sentenced to life imprisonment at the conclusion of the guilt phase of the bifurcated trial and the jury should not have been allowed to return the death penalty verdict. The basis of this contention seems to be that because the trial for the alleged murder of Mrs. Mayer resulted only in a life sentence that the giving of the death sentence for the second murder committed at the same time is barred under the principles of res judicata and collateral estoppel.

Appellant, of course, is concerned by the fact that the jury in the penalty phase trial of the killing of Mrs. Mayer resulted in the

jury not agreeing on the death penalty; whereas they did find a verdict for the death penalty in the case sub judice. Any court may take judicial knowledge that under the make-up of various juries, there is no prediction or known reason why different verdicts are reached. There is one situation, however, in the case at bar which stands out. It is that as we have hereinbefore discussed, a capital murder conviction and resulting death penalty may be had only if a murder is committed while performing certain other acts including robbery. The proof is that the car in the sole possession of appellant shortly after the death of young Mr. and Mrs. Mayer was owned by Mr. Mayer and not Mrs. Mayer. If we should speculate, which we do not, the first jury could have reasoned that Mr. Mayer was the one robbed of his property. We shall see later that the jury in the case sub judice specifically found that this was a robbery of "Mr." Mayer's property.

Appellant relies on the case of Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981).

These cases easily are distinguishable from the case sub judice. In Ashe, we have masked men breaking up a poker game by robbing each individual player. Ashe was indicted for robbery of each person. On his first trial the jury found him not guilty. The issue in the case was a question of "identity," as to whether Ashe was one of the robbers. The first jury found he was not. The Supreme Court held that the rule of collateral estoppel applied and the prosecution should not be allowed to have another jury pass on this question. In the case at bar, we have an entirely different situation--there were two murders. Appellant was tried and convicted of capital murder. The only difference between the two trials was that the jury in the first failed to agree on punishment. The case sub judice was a trial

for a separate and distinct murder, for which he had not received a prior acquittal. In the penalty phase of the trials there was no question of identity as the Supreme Court had in Ashe, supra.

In Bullington, supra, there had been a prior trial and an acquittal of the accused, which as shown above was entirely different from the facts presented in the present case. We find no merit in this assignment.

ASSIGNMENT OF ERROR NO. V.

[6] Appellant alleges error in the refusal of the trial judge in the case sub judice to rehear a request by appellant to suppress the two voluntarily given notes written in appellant's handwriting while confined in jail. We heretofore have discussed these notes. It is admitted that appellant had been given all of his constitutional warnings, including Miranda, an attorney was appointed for him and representing him at the time. Admittedly, without consulting his attorney, appellant wrote the two notes in question in

his cell and gave them to the jailor to be given to the head jail warden. Appellant was the one who chose to do this without consulting his attorney.

Prior to the trial for the death of Mrs. Mayer, appellant's attorney moved to suppress both of the notes. This motion was styled and filed as a motion in both indictments and as one instrument filed in both causes. The hearing before the trial judge prior to the first trial definitely was a hearing on both indictments. The lower court in refusing to suppress the voluntarily written statements said:

> Well, the court finds beyond a reasonable doubt that on November 29, 1979, [the day the notes were written], that the defendant was aware of his Fifth Amendment Rights and any notes that he wrote on that day were freely and voluntarily written without coercion, threats or intimidation and I will hold that they are admissible for whatever evidentiary value they may have whether it be for verification of his handwriting or whatever significance the Jury might attach to it.

At the trial of the case sub judice before a different trial judge, appellant's attorney again requested that the notes be suppressed. The most that can be said is that he was trying to get a second judge to change the court's mind. This could not be done. We have already seen that the prior hearing was in both cases and the ruling of the first trial judge applied to both. No new grounds whatever were offered in the trial sub judice to change the ruling made by the first trial judge. We find no merit in this alleged assignment of error.

[7] This Court carefully has considered the entire record in the cause, together with all exhibits, briefs, and all instruments appearing either in the original record or the supplemental volumes of the record and they clearly reveal that the jury was fully and adequately instructed before considering either the guilt phase or the penalty phase of the bifurcated trial. On the penalty phase the state and the appellant introduced all of the record involving the guilt phase of the

trial. Appellant introduced nothing else. The state introduced appellant's prior record consisting of a conviction of second degree murder, a conviction of assault with an offensive weapon and a conviction of false imprisonment.

Full and complete instructions were given the jury on the sentencing phase according to prior opinions of this Court involving the same instructions which have been approved by the United States Supreme Court. The jury unanimously found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. They found that the murder of Mayer was committed in the course of the crime of robbery adding "the car belonging to Joseph Mayer." The jury specifically found that in addition to appellant committing the murder in the course of the crime of robbery, that the murder was committed in an especially heinous, atrocious and cruel manner in that the victim was bound hands and feet by his own clothing, was shot in the back of the head by

direct contact, his body abandoned in a secluded area, and that appellant was previously convicted of three felonies.

[8] Under the capital murder statute [MCA § 99-19-101 Supp. 1981)] adopted by the Legislature on April 13, 1977, and appearing as the Laws of 1977, Chapter 458, the Legislature confined aggravating circumstances to eight sub-head situations. In the case sub judice the trial judge instructed the jury that they were only to consider three statutory circumstances, they being the ones listed specifically by the jury in its verdict. The lower court correctly confined the jury to finding only aggravating circumstances that were proven by the evidence. The jury was not left to make its own findings of aggravating circumstances as was condemned in Jordan v. Watkins, et al., 681 F. 2d 1067 (5th Cir. 1982). The court's instructions "channelled the sentencers' discretion by clear and objective standards and provided specific and detailed guidance.'" The court specifically

instructed the jury that it was to find beyond a reasonable doubt that one or more of the three above discussed aggravating circumstances existed before a death penalty verdict could be returned and was specifically instructed that if none of these elements were found to exist, the death penalty could not be imposed. The jury's authority was limited and it was specifically instructed regarding its consideration of aggravating circumstances under the evidence submitted. No speculation was left for the jury.

We have carefully reviewed the present record along with all of the death penalty cases considered by this Court subsequent to Jackson v. State, 337 So. 2d 1242 (Miss. 1976). We have carefully compared those cases with the present case and clearly find that the conviction and death penalty verdict of appellant in the present case is consistent and even-handed with all of the death penalty cases reviewed as stated above.

[9] A study of the entire record convinces this Court that the sentence of death was not imposed by the jury under influence of passion, prejudice or any other arbitrary factor. The evidence reveals that the jury was fully warranted in finding the statutory aggravating circumstances to exist as shown in the jury's verdict. The sentence of death clearly was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. As stated, all death cases subsequent to Jackson, supra, have been fully reconsidered by this Court, and we do not find any prejudice or error in the present case after such consideration.

The record reveals that appellant's trial attorneys were competent and defended appellant in a vigorous, reputable and efficient manner. He received a fair trial.

The cause is affirmed and December 8, 1982, set for the execution of the death sentence as provided by law.

AFFIRMED.

PATTERSON, C.J., SUGG and WALKER, P. JJ., and BROOM, ROY NOBLE LEE, HAWKINS, DAN M. LEE and PRATHER, JJ., concur.

Supreme Court, U.S.
FILED
FEB 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1032

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

MORRIS THIGPEN, ET AL.
Petitioners

v.

KENNETH W. WHEAT
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondent, Kenneth Wheat, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF CASE

The Court of Appeals below affirmed the district court's partial grant of habeas corpus relief and order that a new capital sentencing hearing be held, because the prosecutor's closing argument at the penalty phase went considerably beyond the argument found constitutionally offensive in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In this case, the prosecutor argued to the jury that any decision to impose the death penalty would be reviewed by four separate courts: the trial court, the "nine" justices on the Mississippi Supreme Court, "the Supreme Court in Washington", and the federal courts. He erroneously told the jury that the trial court would "review your decision at a later time to see if you've made any errors". He described the members of

the Mississippi Supreme Court as men of "wisdom, and knowledge and compassion and mercy, and understanding and legal experience", thereby, implying that they had the power to grant mercy if a mistake had been made. Pet. App. A. 24-25. [1] Thereafter, he misled the jury by stating that their decision about the sentence was reviewable and not "final":

> Again I say to you, and then I'll leave it to you, just remember this, if your verdict is that of the death penalty, that's not final. There's so many more people who will look at this case after you have made your decision in this case. Others will look at your work and see if you made the right decision. And I can assure you, Ladies and Gentlemen, that if one finds that you have not, that they will send him back, and tell us to try it over because some one made a mistake.
>
> [Objection overruled].

Id. at 25-26.

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[1] The relevant portions of the prosecutor's closing arguments are set forth in the Court of Appeal's decision and in Petitioner's Appendix A. 24-26.

As found by the courts below, this argument is clearly unconstitutional under Caldwell v. Mississippi, where this Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 86 L.Ed.2d at 239. The Court concluded that an argument that the jury's decision on punishment was "automatically reviewable" by the Mississippi Supreme Court "sought to give the jury a view of its role . . . that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability'" in the determination of punishment. Id. at 246. The Court found arguments that the sentence would be reviewed minimized the jury's sense of responsibility, id. at 240-241, and were misleading, inaccurate

and "wholly irrelevant to the determination of an appropriate sentence." Id. at 243-244. [2]

The conclusions by the district court and the Court of Appeals that the prosecutor's argument rendered the imposition of Mr. Wheat's death sentence fundamentally unfair in violation of the Eighth and Fourteenth Amendments, under this Court's opinion in Caldwell, is not challenged by Petitioner, the State of Mississippi.

---

[2] As observed by the courts below in this case, even Chief Justice Rhenquist, dissenting in Caldwell, indicated that "had the prosecutor in this case actually . . . argued to the jury that it should go ahead and impose the death sentence because it did not really matter -- the appellate court would correct any 'mistake' the jury might make in choice of sentence -- and if the trial judge had not corrected such an argument, I might well agree that the process afforded did not comport with some constitutional norm related to procedural fairness". 86 L.Ed.2d at 252. Such an argument was made in Mr. Wheat's case.

SUMMARY OF ARGUMENT

The prosecutor at the sentencing phase of Mr. Wheat's capital trial expressly and erroneously assured the jury that reviewing courts would look at their decision as to the sentence and determine whether or not they made a "mistake". There is no question, nor does the State argue to the contrary, that this argument violates the principles announced in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), where the Court found that virtually identical remarks by a prosecutor were in violation of the Eighth Amendment.

Moreover, the courts below were correct in reviewing the merits of Mr. Wheat's claim. All of the federal courts below, after surveying Mississippi decisional law, concluded

that because the Mississippi Supreme Court, invoked for the first time in Mr. Wheat's case a procedural bar that had not previously announced or consistently applied to other litigants, the state rule did not constitute an independent and adequate state law ground to which the federal courts were required to defer. See Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); King v. Thigpen, 441 So.2d 1365 (Miss. 1983)(Robertson, J., dissenting); Evans v. State, 441 So.2d 520 (Miss. 1983)(Robertson, J., dissenting). Because this Court has consistantly indicated that only state procedural bars which are clearly announced and consistently applied to other litigants prevent federal review of constitutional claims, no substantial question of federal law exists. James v. Kentucky, 466 U.S. 341 (1986).

The decision of the Court of Appeals represents nothing more than a Federal

Court of Appeals analyzing state decisional law within its circuit and applying established precedent of this Court. Because this Court customarily defers to Federal Courts of Appeals on questions of state law, and the state courts' use of procedural bars, Rummel v. Estelle, 445 U.S. 243, 267, n.7 (1980), there is no reason to review the decision below and, certiorari should not be granted.

REASONS FOR DENYING THE WRIT

The State has not presented any substantial question of federal law which has not been settled by this Court, nor has it demonstrated that the decision by the Court of Appeals conflicts with decisions by other courts or this Court.

ARGUMENT

The Courts Below Were Correct in Reviewing the Merits of Mr. Wheat's Claims of Prosecutorial Misconduct

In its decision, the Court of Appeals, presented with the identical arguments made by the State in its petition to this Court, undertook a review of Mr. Wheat's claim that the prosecutor's closing argument at sentencing rendered his death sentence unconstitutional. Because the decision of the Court of Appeals rests on established precedent of this Court, no substantial question of federal law is presented.

As in Caldwell, there was objection to the offending argument at Mr. Wheat's trial. The issue was presented to the Mississippi Supreme Court, not on direct appeal, but in Mr. Wheat's application for post-conviction relief, which at the time was an acceptable procedure to

present claims of error in capital cases. However, in a marked departure from its previous decisions, the Mississippi court refused to review the claim, instead announcing for the first time a new, strict bar to the consideration of such claims. Wheat v. Thigpen, 431 So.2d 486, 488 (Miss. 1983).

As the Court of Appeals recognized, ordinarily federal courts will not review the merits of federal claims which the state court has found to be forfeited absent a showing of cause and prejudice. The Court of Appeals expressed the principles of comity which underlie this general rule:

> The Supreme Court "has long recognized that in some circumstances considerations of comity and concerns for the administration of criminal justice require that a federal court forego the exercise of its habeas corpus power. Francis v. Henderson, 425 U.S. 536, 539 (1976) . . . The Supreme Court has specifically held that a feeral court may not review a habeas petitioner's federal claims when the state courts have declined

to pass on the claims because of an independent and adequate state procedural ground, absent a showing of cause and prejudice. Engle v. Issac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

A. 6-7, 793 F.2d 624.

However, as stated by this Court and recognized by the courts below, federal courts will not defer to a state procedural bar unless the state court relied on procedural rules and requirements which were clearly announced to the defendant and his counsel, which were in force at the time of his trial or appeal and which are fairly applied to all litigants. James v. Kentucky, 466 U.S. 341, 348 (1984) (only state procedural rules which are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights"); Hathorn v. Lavorn, 457 U.S. 255 (1982); Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965). Moreover, because such

procedural defaults "prevent implementation of a fedral right[,] . . . the question of how and when defaults in compliance with state procedural law rules can preclude [the] consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. at 447.

Thus, the Court of Appeals was required to determine whether the procedural bar involved in Mr. Wheat's case was clearly announced to litigants and their counsel and fairly and consistently applied. Such an analysis is consistent with the analysis used by all other federal courts that have addressed the issue. See, e.g., Spencer v. Zant, 781 F.2d 1458 (11th Cir. 1986)(en banc)(court is not precluded from reviewing claim by state procedural bar which was retroactively applied and unfair in its treatment of habeas petitioner's claim); Granviel v.

Estelle, 655 F.2d 673, 679 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) ("We cannot enforce against Granviel a contemporaneous objection rule that apparently did not even exist at the time of his trial"); Lumpkin v. Ricketts, 551 F.2d 680, 682 n. 2 (5th Cir. 1977), cert. denied, 434 U.S. 957 (1977)(applying state law in effect at time of trial); Freeman v. Georgia, 599 F.2d 65, 71 (5th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (rejecting state finding of procedural waiver where the court did not cite specific rule which was violated); Maxwell v. Sumner, 673 F.2d 1031, 1034 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982) (examining state's claim of procedural bar, and finding no such procedural rule).

In its opinion, the Court of Appeals surveyed the law of the state within its circuit. A. 11-17. 793 F.2d

625. At the time of Mr. Wheat's application the accepted method for post-conviction relief in Mississippi was the writ of error coram nobis. Edwards v. Thigpen, 433 So.2d 906, 907 n.1 (Miss. 1983). The use of that writ in Mississippi as a means for post-conviction review in criminal cases has evolved over the last three-quarters of a century.

Initially limited in its application to civil cases, the Mississippi Supreme Court first applied the writ in criminal cases in Fugate v. State, 85 Miss. 94, 37 So. 554 (1904). Thereafter, relying upon a Mississippi law which codified and expanded the use of the writ, the court expanded the scope of coram nobis review from challenges to a trial court's jurisdiction to include presentation of newly discovered evidence which went to the "merits" of the trial. Lang v. State, 230 Miss.

147, 92 So.2d 670 (1957).

Later in In re Broom's Petition, 251 Miss. 25, 168 So.2d 44, 47-48 (1964), the court expressly recognized that the writ was available for claims asserting "the right to a new trial upon the ground that the sentence was imposed in violation of the Constitution".

Since Broom, the court has reaffirmed that the writ is available for claims asserting constitutional violations. See, e.g., Phillips v. State, 421 So.2d 476, 483 (Miss. 1982) (coram nobis available for a "collateral attack based upon constitutional defects . . ."); Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975)("In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis");

Botts v. State, 210 So.2d 777, 779 (Miss. 1968)("the violation of the constitutional right . . . to counsel constitutes ground for granting a writ of error coram nobis"); Fondren v. State, 199 So.2d 625 (Miss. 1967)(post-conviction relief granted for constitutional claim of exclusion of Blacks from juries); Windom v. State, 192 So.2d 689, 691 (Miss. 1966), ("This Court has provided a plain, adequate and speedy post-conviction remedy for adjudication of all issues that may be raised under the United States . . . Constitution").

The Court of Appeals and the district court in this case as well as two other federal district courts in Mississippi, Pruett v. Thigpen, No.EC84-31-LS-D (N.D.Miss, No. 21, 1984); Edwards v. Thigpen, 595 F.Supp. 1271, 1278 (S.D.Miss 1984), have all concluded that until it considered Mr. Wheat's

application for coram nobis relief, the Mississippi Supreme Court had consistently reviewed the merits of constitutional issues raised in post-conviction proceedings in death cases. [3]

As acknowledged by the Attorney General in seeking the procedural bar eventually announced in this case,

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[3] The Mississippi Supreme Court has vacated a death sentence because of improper prosecutorial arguments identical to those made in this case even when no objections had been raised at trial. See Williams v. State, 445 So.2d 798, 810 (Miss. 1984). And, in Caldwell, which came to the Mississippi Supreme Court in exactly the same procedural posture as Wheat (a contemporaneous objection was made at trial to the prosecutor's argument, but the issue was not assigned as error on appeal), the Mississippi Supreme Court raised the issue sua sponte. Caldwell v. State, 443 So.2d 806, 813 (Miss. 1983). On certiorari to this Court, the State, as it does in this case, asserted that the claim was procedurally barred. 86 L.Ed.2d at 238. However, this Court rejected the argument and held that the Mississippi Supreme Court had addressed the merits of the federal claim. 86 L.Ed.2d at 238-239.

"[i]n line with this doctrine of enhanced review, [the Mississippi Supreme] Court has in the past considered with few exceptions all claims [in death penalty cases], . . . in a post-conviction petition presented to it. See: Bell v. Watkins, 381 So.2d 118 (Miss. 1980); In re Jordan, 390 So.2d 584 (Miss. 1980)."[4]

In Bell, the Court "carefully and meticulously considered each allegation" on the merits, including seventeen claims which were raised for the first time on coram nobis. 381 So.2d at 119. Similarly, in Jordan, where the

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[4] "Response to Application for Leave to File a Petition for Writ of Error Coram Nobis and/or Writ of Habeas Corpus" filed in Edwards v. Thigpen, introduced as an exhibit below, at 22. As will be discussed infra, Edwards, 433 So.2d 906 (Miss. 1983), was part of a trilogy of cases in which the Mississippi Supreme Court adopted the position asserted by the Attorney General and discontinued its practice of reviewing "all claims" presented to it on applications for coram nobis relief.

petitioner raised three new claims on coram nobis, the Court rejected the claims without relying on the fact that they had not been raised on direct appeal.

The same occurred in every other capital case which came before the Court prior to Mr. Wheat's. Culberson v. State, 412 So.2d 1184 (Miss. 1982) (court reaches merits of claims in coram nobis); Bullock v. State, Miss. S. Ct. No. 51,937 (unpublished order dated Oct. 7, 1981) ("The Court . . . has considered the grounds stated in the application . . . and finds the application lacks merit and should be denied."); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), rehearing denied with opinion, 685 F.2d 139 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983) (court finds Mississippi court ruled on merits of claims); Voyles v. Watkins, 489 F. Supp. 901, 912 n. 7 (N.D. Miss. 1980)

(court describes Mississippi practice to review capital cases without regard to assignment of error); Jones v. Thigpen, 555 F. Supp. 870, 873 (S.D. Miss. 1983) (court holds that Mississippi ruled on merits of coram nobis), mod. on other grounds, 741 F.2d 805 (5th Cir. 1984).

Thus, as found by the courts below, until the filing of Mr. Wheat's application for a writ of error coram nobis, the Mississippi Supreme Court had consistently considered the merits of claims asserted in such applications. Then, in a trilogy of cases, one of which was Mr. Wheat's case, the Mississippi Supreme Court, announced a new policy of refusing to consider claims asserted for the first time on coram nobis in capital cases. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983), Smith v. State, 434 So.2d 212 (Miss. 1983).

In two later cases, Evans v. State, 441 So.2d 520 (Miss. 1983) and King v. Thigpen, 441 So.2d 1365 (Miss. 1983), several justices of the Mississippi Supreme Court, supporting the conclusion of the Court of Appeals, observed that these decisions were a marked contrast to the Mississippi Court's treatment of similar claims in previous cases in which that "Court has repeatedly allowed presentation of constitutional issues which could have been litigated at trial or on direct appeal but for various reasons were not." Evans, 441 So.2d at 525 (Robertson, J., dissenting):

> For at least two decades the writ of error coram nobis has been a post-conviction form of action through which prisoners of the state have filed constitutional challenges to their convictions and sentences. We have venerated this writ, for it fulfills our felt obligation to assure that no person experiences the sting of the state's penal sanctions inconsistent with the constitution.

. . .

> Today's decision renders the writ of error coram nobis an empty form of action. It is still on the books. There is simply not much of any importance it may be used for.

Id. at 524.

As noted by the dissenting justices on the Mississippi court and the Court of Appeals in its opinion below, the change in treatment of coram nobis applications by the Mississippi Court came in response to a plea by the State to impose procedural bars for the express purpose of preventing federal habeas corpus review. As described by the minority in Evans:

> . . . The State is saying we should hold Evans' claims procedurally barred, not because such would promote the interests of justice, but rather that such would pull the rug out from under Evans when he ultimately seeks federal review of his case. The State not only asks that we refuse to address Evans' claims on their merits but unashamedly further seeks our aid in avoiding litigation of Evans sixteen federal constitutional claims in any federal court.

Id. at 531 [emphasis original]. The dissenters found the newly found "affec-

tion for procedural bars to be particularly unseemly" because the Attorney General's "undisguised demand that this Court assume an adversary position" was made only after seven death sentences had been vacated by the federal courts due to constitutional violations. Id. at 531-32.[5]

As the State has established, the Fifth Circuit has been vigilant in refusing to address federal claims which were procedurally forfeited in state courts. Petition at 21-25. See, e.g.,

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[5] As observed by the Court of Appeals the "undisguised demand" was presented in the State's Response to the application for coram nobis relief in Edwards v. Thigpen, one of the trilogy of cases in which the new policy was applied. That Response was submitted as an exhibit to the District Court below and summarized by the Court of Appeals. A. 18-20. In it, the State urged the Mississippi court to begin a new practice of declaring claims presented for the first time in post-conviction proceedings by capital defendants to be procedurally barred expressly for the purpose of preventing federal review of those claims.

Bass v. Estelle, 696 F.2d 1154, rehearing denied with opinion, 705 F.2d 121 (5th Cir. 1983), cert. denied, 464 U.S. 865 (1983)(court defers to declaration of procedural forfeiture by state courts and rejects assertion that Texas courts do not regularly apply procedural bars). The Fifth Circuit has fully honored procedural bars imposed by the Mississippi Supreme Court in other cases, where the state court regularly declares procedural rules that are clearly announced to the litigants. Young v. Herring, 777 F.2d 198 (5th Cir. 1985). [6]

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[6] Despite strict adherence by the Fifth Circuit to the principles of Wainwright v. Sykes, the State argues that the Court of Appeals "ignored" its own precedent by failing to follow Bass, Young and Henry v. Wainwright, 686 F.2d 315 (5th Cir. 1982). However, these cases were fully briefed to the Court of Appeals below, members of which had decided those cases. Each of the cases isclearly distinguishable.

[Footnote continued next page.]

In reviewing the history of Mr. Wheat's case, however, the Court of Appeals reached the same conclusion as that reached by the other federal district courts that also reviewed the practices of the Mississippi Supreme Court in capital cases:

[Footnote 6 continued]

Young is a noncapital cases and has no applicability to this case. Bass involved a new procedural rule which was only applied by the Texas courts prospectively, and not retroactively as in Mr. Wheat's case. Henry involved only the question whether the state court actually had invoked a procedural bar or ruled on the merits of the claim, not the issues in this case, whether the procedural rule had been announced and fairly applied to all litigants. Rather than "ignore" its own precedent, the Court of Appeals simply recognized that those cases have nothing to do with the issue in this case. Thus, none of these cases presents a reason for granting certiorari.

> In the years immediately preceding Wheat's appeal the Mississippi Supreme Court routinely reviewed claims made for the first time on writ of error coram nobis. The first case where the court expressly declares that it will not consider claims raised the first time on writ of error coram nobis is the case involving Wheat's petition. Wheat v. Thigpen, 431 So.2d 486 (Miss. 1983). In a series of cases following Wheat the court held that it would not consider claims raised for the first time on writ of error coram nobis. King v Thigpen, 441 So.2d 1365 (Miss. 1983); Evans v. State, 441 So.2d 520 (Miss. 1983); Smith v. State, 434 So.2d 212 (Miss. 1986); Edwards v. Thigpen, 433 So.2d 906 (Miss. 1986) . . . . We also note that the State admits in a brief filed in another case that the Mississippi Supreme court 'has in the past considered with few exceptions all claims, either on direct appeal or in a post-conviction petition presented to it . . . . We are therefore persuaded that the Mississippi Supreme Court had not clearly announced or strictly or regularly followed the procedural bar at the time of Wheat's direct appeal.

793 F.2d at 627 (footnote omitted).

Accord, Pruett v. Thigpen; Edwards v. Thigpen; Johnson v. Thigpen, No. J84-0501 (B) (S.D. Miss. December 13, 1985).

Thus, the Mississippi Supreme Court created:

> a situation where a state court has followed a regular past practice of entertaining claims in a procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar. . . . [A] procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence.

Walker v. City of Birmingham, 388 U.S. 307, 319 (1967), citing Barr v. City of Columbia, and Wright v. Georgia, 373 U.S. 284, 291 (1963).

The State, string citing a number of cases, essentially argues that this Court should grant certiorari to undertake an analysis of Mississippi cases to see if the Court of Appeals was correct in its conclusion.

All of the cases cited by the State were fully briefed and argued to the courts below, including the Court

of Appeals. [7] It is axiomatic that this Court customarily defers to Federal Courts of Appeals on questions of state law. See, e.g., Pembaur v. Cincinati 475 U.S. ___, ___n.13, 106 S.Ct. 1292, 1301, n.13, 89 L.Ed.2d 452 (1986); Regents of University of Michigan, v. Ewing, 474 U.S. ___, ___, n.10, 106 S.Ct. 507, 513 n. 10, 88 L.Ed.2d 253 (1985); United States v. S.A. Epresa de Viacao Area Rio Grandese, 467 U.S. 797, 815, n.12 (1984);

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7 As was demonstrated to the Court of Appeals, virtually all of the cases cited by the State where the Mississippi Supreme Court did not reach the merits of claims raised in post-convcition are either noncapital cases or capital cases decided before Furman, after which the Mississippi Court began its regular practice of reviewing capital cases in a comprehensive way. With respect to those cases where the Mississippi Court did review the merits of claims raised for the first tiem in post-conviction proceedings, the State's only repsonses are that they were not "really" decisions on the merits but merely "descriptions" or "chronicling" of the claims presented. As the Court of Appeals found, however, the decisions of the Mississippi court belie this assertion.

Bishop v. Wood, 426 U.S. 341, 345-47 (1976); Proper v. Clark, 337 U.S. 472, 486-87 (1949). It has done so when the issue involves application of state procedural rules which prevent review of federal rights. See, e.g., Jenkins v. Anderson, 447 U.S. 231, 234, n.1 (1980)("The applicability of the Sykes 'cause' and 'prejudice' test may turn on an interpretation of state law . . . . This Court's resolution of such state-law questions would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); Rummel v. Estelle, 445 U.S. 243, 267, n.7 (1980)("Deferring to the Court of Appeal's interpretation of Texas law, we decline to hold that Wainwright bars Rummell from presenting his claim"). The State has offered no justification why that rule should not be followed in this case.

The Court of Appeals fully considered each of the arguments and cases presented to this Court by the the State. The Court of Appeals was correct in concluding that the new procedural policy announced by the Mississippi Supreme Court in Mr. Wheat's case is not an independent and adequate state ground which prevents vindication of his federal rights.[8]

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[8] For this reason, the Fifth Circuit did not reach the question of cause for the failure to assign the issue as error and prejudice. However, because the Mississippi court had not announced its new restrictive rule, Mr. Wheat's failure to present the claim on direct appeal, in light of the foregoing, was not attributable to an "intentional decision by counsel made in pursuit of his client's interest". Reed v. Ross, 468 U.S. ___, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1 (1984). Additionally, the failure of counsel to "raise a constitutional issue reasonably unknown to him is one of the situations in which the cause requirement is met". Id. Caldwell did not settle the question until last year. The Eleventh

[Foonote continued on next page.]

The State has not established that this case presents any unique or important questions of federal law, or that the decision of the Court of Appeals conflicts with decisions by other courts. In fact, the decision by the Court of Appeals is fully supported by the decisions of this Court and other federal courts. Accordingly the petition should be denied.

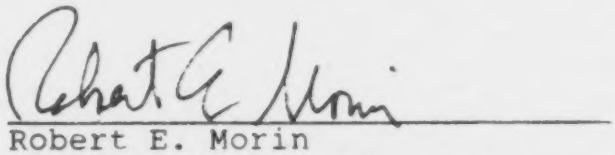
[Footnote continued from previous page.]

Circuit has recently ruled that because the decision in Caldwell represented a significant change in the law which was not reasonably anticipated until the decision was made, "cause" exists for the purposes of federal review. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). Thus, even if Mississippi had imposed a procedural bar which was worthy of federal court deference, Mr. Wheat would still be entitled to federal court review. See, e.g., Reed v. Ross; Wainwright v. Sykes, 433 U.S. at 95-96; Huffman v. Wainwright, 651 F.2d 347, 351 (5th Cir. 1981).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing was mailed postage prepaid this 23rd day of February, 1987, to Marvin L. White, Office of the Attorney General, P.O. Box 220, Jackson, Mississippi, 39205.